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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1777~~ 70-233

ROBERT H. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC.,
Petitioners,

vs.

INTERNATIONAL INDUSTRIES, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, ROBERT J. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit") rendered in these proceedings on January 14, 1971, and the order of that Court issued March 4, 1971 denying petitioners a rehearing. This petition is limited solely to that part of the opinion and judgment of the Eighth Circuit determining that the trial court, the United States District Court for the Western District of Missouri, properly denied petitioners' prayer that respondents be enjoined from evicting petitioners.

OPINIONS BELOW

The opinion of the Eighth Circuit, and the order of that Court denying rehearing, neither of which has been reported yet, appear at Appendices A and B, infra, pp. A1 and A7, respectively. (Petitioners have filed with this Court their separate appendix originally filed with the Eighth Circuit. References to that appendix will be in the following form—"A. 29". References to the appendix being filed initially with this brief will be in the following form—"App. B, infra, p. 7". Petitioners have also furnished to this Court copies of Appellants' Brief, Appellants' Reply Brief, and Appellants' Petition for Rehearing, all addressed to the Eighth Circuit. Any references to these documents will be clearly marked.) The opinion of the trial court is unreported and appears at App. C, infra, p. A9.

JURISDICTION

The Judgment of the Eighth Circuit (App. A, infra, p. A1) was entered on January 14, 1971. A petition for rehearing, timely filed, was denied on March 4, 1971. (App. B infra, p. A7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the claims of a franchisor-lessor for goods and services furnished to its franchisee-tenant, for purposes of determining the franchisor-lessor's rights to terminate the license agreement and premises lease between the parties and to enforce such terminations by unlawful detainer action in state courts, are severable from the franchisor-

licensor's claims against the franchisee-licensee for renounced and unfurnished illegally tied services—

(1) where the franchisee-licensee was financially unable to timely pay for the furnished goods and services because of monetary losses suffered as a direct result of the illegal tying arrangements imposed upon it by the franchisor-lessor, or

(2) where such unlawful detainer action is being used as a tool to enforce the franchisor-lessor's illegal tying arrangements.

CONSTITUTIONAL AND STATUTORY RULES INVOLVED

Article III, Section 2, Clause 1, of the Constitution of the United States provides, in pertinent part, as follows:

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising * * * between Citizens of different States * * *."

Section 16 of the Clayton Act, 15 U.S.C. § 26, 38 Stat. 737, states:

§ 16. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction

may issue: *Provided*, That nothing herein contained shall be construed to entitle any persons, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

STATEMENT OF THE CASE

In two consolidated actions for treble damages against International Industries, Inc., and two of its wholly-owned subsidiaries (these three corporations, who are the respondents to this petition, will be referred to collectively as "International") pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, by Robert J. Helfenbein and two corporations in which he was the sole stockholder and the principal operating officer, Circle Investments of Missouri, Inc. ("Circle"), and Crescent Investments of Iowa, Inc. ("Crescent"), the plaintiffs sought to enjoin International from pursuing eviction and arbitration actions against the three plaintiffs pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. (A. 4, 22, 23, 26, 39, 40). The injunction is also sought pursuant to the general equitable powers of the Court under Article III, Section 2, Clause 1 of the Constitution of the United States "to make more effective the relief provided in the antitrust statutes." *Bateman* v. *Ford Motor Co.*, 302 F.2d 63, 65, 66 (3rd Cir.). The principal allegation of plaintiffs' complaints is that International imposed certain tying requirements on them in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. § 14).

Circle, under assignment from plaintiff Helfenbein, owns the franchise to operate the International House of Pancakes ("IHOP") restaurant at 6501 Troost, Kansas City, Missouri. Crescent, also under assignment from Plaintiff Helfenbein, owned the franchise to operate an IHOP restaurant in Des Moines, Iowa. (Ex. 1, p. 1). (Exhibits 1 through 15, inclusive, were before the Eighth Circuit, and are in one binder. Exhibits 16 through 29 are being furnished initially with this petition, and are in a separate binder.) Crescent was evicted from the Des Moines Restaurant on or about May 18, 1969. (A. 33). Therefore, eviction issues with respect to Crescent are now academic. Also, the three plaintiffs have decided to rely on the decision of the Eighth Circuit to the effect that they may raise in court their anti-trust defenses to the arbitrable issues after any awards (App. A, infra, p. A3), and on the indicated willingness of International to raise such arbitrable issues as counter-claims in the District Court. (App. A, infra, p. A3, fn. 1). Therefore they no longer seek to enjoin International from arbitration. The only parties to this petition, therefore are Helfenbein and Circle, whom we will refer to collectively as "Helfenbein."

Helfenbein signed the licensing documents with respect to the Kansas City store on August 17, 1966. These licensing documents consist of a License Agreement (Ex. 1-B), an Equipment Lease (Ex. 1-D), and a Sub-Lease of the premises (Ex. 1-F), all on forms printed by International. The various documents were so integrated that a violation by the licensee under only one of them could result in a revocation of all three. Article VIII of the License Agreement (Ex. 1-B) provides for cancellation of the franchise in the event the licensee breaches its terms. Article II of the premises sub-lease (Ex. 1-F) provides for cancellation of the sub-lease in the event the franchise is terminated. Likewise, Article II of the Equipment Lease

(Ex. 1-D) provides for termination of that lease upon termination of the Sub-lease. The licensee's financial obligations to International under the two leases are incorporated into paragraphs A(1)-A (3), Article IV, of the License Agreement. Article XIII of the License Agreement provides for arbitration in Los Angeles, California of all disputes that could arise between the parties, reserving to International however, the unlimited right to apply to "any court of competent jurisdiction for appropriate writs for recovery of possession of the premises" without first proceeding to arbitration.

Helfenbein has alleged and offered unrebutted evidence that International illegally tied the purchase or lease of substantially all goods and services required for the operation of his Kansas City IHOP restaurant (with the exception of that normally provided by hired employees) to the purchase of the IHOP license and the lease to operate that restaurant, and that he has been substantially overcharged for such goods and services. (Ex. 1, pp. 2-5; Ex. 1-B, p. 3; Ex. 1-D).[1] The evidence clearly indicates that International was receiving rebates from Helfenbein's "approved suppliers." (Ex. 7-11, inclusive). The trial judge stated at the hearing on the injunction issue "* * * I find, first, that there is a substantial likelihood of success in the plaintiff's case here." (Tr. 59, 60).

Helfenbein was unable to timely pay his financial obligations to International, which was not only his franchisor, but also the landlord of his restaurant, the lessor of substantially all of his furniture, equipment and fixtures, his almost exclusive supplier, and his bookkeeper. Upon the advice of counsel, as of February 5, 1968, Helfenbein under-

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1. See pages 7 and 8 of Appellant's Brief to the 8th Circuit for a more detailed description of the tying requirements.

took prospectively to pay International timely for goods purchased and for premises and equipment rental, and renounced those portions of the License Agreement which required him to purchase all food and restaurant supplies and certain services from International. He has, with inconsequential differences that he has offered to resolve, timely paid International premises and equipment rental, and bills for food and other goods, since February 5, 1968. (Ex. 1, pp. 2-4, 7, 8; A. 75, 76).

The unrebutted evidence offered by Helfenbein was that "it was and is financially impossible for me and my two corporations to operate our IHOP restaurants profitably and pay the defendants as required by the contract." This evidence included computations by Helfenbein's accountant showing overcharges by International totalling $82,600 from the opening of each restaurant through February 28, 1969. The Des Moines restaurant opened on or about December 1, 1965 and the Kansas City restaurant on or about January 16, 1967. (Ex. 1, pp. 1-4; Ex. 2).

Since renouncing the various tying agreements, Helfenbein's remaining restaurant has prospered, with its profits growing each accounting period, as illustrated by the following summarization. (Exs. 16, 17, 18, 19 and 20).

	Nine mos. Ended Sep. 30, 1967*	Fiscal Year Ended September 30, 1968	1969	1970	6 Months Ended Mar. 31, 1971
Net sales—foodstuffs	$155,400	$231,200	$243,400	$275,100	$149,900
Purchases	55,400	74,700	68,200	76,100	40,600
Percentage of Purchases to Net Sales—foodstuffs	35.6%	32.3%	28.0%	27.1%	26.2%
Executive Salary (To Helfenbein)	3,600	8,000	11,200	16,100	10,400
Net Profit (Loss) Before Income Taxes	(9,200)	12,800	13,800	13,900	17,500
Total Executive Salary and Net Profit	(5,600)	20,800	25,000	30,000	27,900

*Restaurant opened on or about January 16, 1967.

On or about March 5, 1969, International mailed a notice to Helfenbein notifying him that the License Agreement, Equipment Lease and premises sub-lease with respect to his Kansas City IHOP restaurant were terminated, and that the premises should be vacated on or before March 15, 1969. The terminations were based upon claimed failure to pay equipment and premises rent, franchise fee, "service and advertising charges," "suppliers' bills", and "violation of standard procedures." (Ex. 1-M). International was the only "supplier" involved. (Ex. 5).

As of March 31, 1969, International claimed that a total of $75,000 was due from Helfenbein's two restaurants for goods and services. $45,000 represented charges for goods and services purportedly furnished prior to February 5, 1968. $30,000 represented charges for post-February 5, 1968 renounced services which were not furnished. In addition, International accelerated the payment terms of Helfenbein's license fee note on the Kansas City restaurant, and claimed $11,300 principal and interest as being due as of March 31, 1971. (A. 71-75).

The injunction was denied by the trial court. (App. C, infra, p. A11). The Eighth Circuit affirmed the trial court (App. A, infra, p. A6), and denied Helfenbein's petition for rehearing. (App. B, infra, p. A8). International filed an unlawful detainer action in the Magistrate's Court for the Fourth District of Jackson County, Missouri on April 14, 1971 (Ex. 21), Helfenbein's petition for stay of mandate having been denied by the Eighth Circuit. (8 C.A., Tr., p. 26). The unlawful detainer petition omitted reference to the illegally tied services which were not paid.

REASONS FOR GRANTING THE WRIT

I.

The Issues Involve Important Questions of Federal Law: (A) Because of the Importance of Franchising in the American Economy; (B) Because of the Common Complaints That Franchisors Illegally Require Franchisees to Purchase Tied Goods and Services and Wrongfully Terminate Their Franchises; (C) Because There Has Been a Substantial Loss to the Economy, Especially Small Businessmen Franchisees Arising Out of Such Abuses; and (D) Because the Application of Traditional Legal Concepts by the Courts Has Often Resulted in Injustice to Franchisees in Franchising Cases, Especially Those Involving Franchise Termination.

Section 2(a) of S. 2507, 90th Congress, 1st Session,[2] a bill introduced by the Honorable Senator Eastland on October 5, 1967, states as follows:

> FINDINGS AND DECLARATION OF POLICY
>
> SEC. 2. (a) The Congress hereby finds that because of the substantial growth in the distribution of goods and services through utilization of the franchise system, in industries engaged in commerce or activities affecting commerce, which system is presently estimated to account for 10 per centum of the Nation's gross national product and 25 per centum of all retail sales that the interest of approximately four hundred thousand small franchisees requires that the great dis-

2. Copies of S. 2321, 90th Congress, 1st Session, S. 2507, 90th Congress, 1st Session, S. 1967, 91st Congress, 1st Session, and S. 3844, 91st Congress, 2d Session, all dealing with franchisor-franchisee relationships, have been appended as Exs. 22, 23, 24 and 25, respectively.

> parity in economic power now heavily weighted in the favor of franchisors be reduced by providing that the franchisor must deal in a fair and equitable manner with its franchisees as to all aspects of the franchise relationship; and that the existing judicial remedies to afford relief to franchisees from injurious practices or franchisors are limited, ineffective, and too costly and franchisees should be provided with a means of simple, direct, and full legal relief against franchisors failing to deal in a fair and equitable manner.

S. 2507 was not reported out of committee. The foregoing findings, however, are indicative of the growth of the franchising business in recent years, and of the corresponding growth of franchisor abuses of franchisees. Consideration should be given also to the background and content of the other bills introduced in the Senate recently regarding franchisee-franchisor relationships which are referred to in Footnote 2, supra, p. 9.

In a Senate Committee Report recently issued[3] (sometimes herein referred to as "the report"), franchising was described as "one of the most dynamic and rapidly growing features of our business economy." Statistics were admitted to be scarce, but the reporting committee estimated "franchising has reached a level of at least $90 billion in annual sales and may now be approaching $100 billion * * *" and that there were "between 450,000 and 600,000 franchise units operating in the country today." (Report, p. 5).

The report also states, however (l.c. p. 6):

> "The rapid growth of franchising in recent years has left the way open to unscrupulous utilization of this marketing concept. Franchise abuses of a fraudulent

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3. Report No. 91-1344, 91st Cong., 2d Sess., "Impact of Franchising on Small Business," Report of the Select Committee on Small Business United States Senate on the Impact of Franchising on Small Business, etc.

> and deceptive character are significant enough to warrant Federal legislation designed to eliminate them."

It was reported that many franchisees suffered from franchisor abuses similar to those alleged in the case on appeal, such as failure to furnish promised services, excessive price markups on illegally tied products and services, and unreasonable and arbitrary termination of franchise agreements and leases. (Report, pp. 13, 14).

At page 23, the report stated "The committee feels that one of the more serious problems facing franchisors is the matter of 'tie-ins,' * * *. Tie-ins have been one major source of complaint brought to the attention of the committee." The heart of Helfenbein's complaint against International involves the tying elements of its license agreements and related contracts.

Without explanation, the report also stated (l.c. p. 12): "It appears to the committee that the concept of franchising is not completely understood by the judiciary or the various state regulatory and enforcement agencies." We submit, however, that the testimony on January 22, 1971 of the Honorable Philip A. Hart, U. S. Senator from the State of Michigan, provides a clue. On page 273 of Part 1 of the Report of Hearings (regarding "The Impact of Franchising on Small Business") before the Subcommittee on Urban and Rural Economic Development of the Select Committee on Small Business, United States Senate, Senator Hart's testimony is reported as follows:

> "Senator HART. Last fall a New York Supreme Court justice was faced with a decision incongruous on its face. His dilemma: should he honor the law or administer justice?
>
> "The case involved a gasoline dealer who had performed well for 5 years in his franchised outlet. Then the parent company decided he wanted the location

for another use. Therefore, the dealer was out of business—and without livelihood, refund of his investment in the building or payment for the goodwill he had worked hard to build up.

"In turning down the dealer's appeal for relief, Justice Joseph F. Gagliardi commented almost bitterly, and these are his words:

> 'It has been the sacredness of contractual obligations which has prevented courts of equity from imposing justice in many circumstances.'

"And he went on to suggest that this was exactly such a circumstance.

"I do not think Justice Gagliardi was faced with a one-of-a-kind set of circumstances. In fact, I know he was not.

"The Senate Antitrust and Monopoly Subcommittee held very lengthy hearings on franchising, and we had a whole list of stories comparable to the situation that confronted the New York justice.

"What they demonstrate most clearly is that calling a franchisee 'an independent businessman' today too often is a sham.

"* * *

"As I said, the complaints of franchisees over the present situation were spelled out in chapter and verse before the Antitrust Subcommittee. One thing was clear after the echoes of those hearings had subsided: franchisees are doing a lot of things under the threat of loss of franchise that they do not like to do."

The point is this. The courts are following traditional legal concepts regarding contracts, landlord-tenant relationships, etc. in regulating relations between franchisors and franchisees, but the imposition of these traditional concepts to present day relations between franchisor and franchisee very often does not make it possible to render a fair and just decision. It is apparent, especially after reading Senator Hart's testimony, that franchisors in gen-

eral are using the courts to enforce their control over their franchisees, often times for illegal purposes. In Helfenbein's case, International is trying to involve him in multiple litigation and remove him from his restaurant because of his express inability and unwillingness to abide by International's tying agreements. The courts have recently responded to the complaints of tenants in other types of retaliatory eviction cases. See, for example *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied 393 U.S. 1016 (1969); *Javins* v. *First National Realty Corp.*, 248 F.2d 1071 (D.C. Cir. 1970); *Schweiger* v. *Superior Court of Alameda County*, 90 Cal. Rptr. 729 (Cal. Sup. 1970). They are recognizing that there are some important rights of tenants that must be considered and weighed against the time honored rule that landlords have an unqualified right to evict a tenant at the expiration of his lease or to terminate a lease for non-payment of rent.

The Congress, as aforesaid, and various state legislatures have taken note of the numerous franchisor abuses of their franchisees, and there is a plethora of legislation that has been either enacted or is presently under consideration.[4] An examination of this legislation and proposed legislation indicates a deep concern with wrongful franchise terminations.

As of the date the Report was written, there was a "definite information gap concerning all vital statistics and economic benchmarks relevant to franchising." (Report, p. 17). Counsel is not aware of any reports, surveys, etc.

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4. Report, pp. 24-27; see also McGuire, State Franchising Regulations, the Conference Board Record, Oct. 1970, p. 29, a copy of said article being appended as Ex. 29; footnote 2, supra.

that have been published since the Report that would be relevant to this petition.[5]

Appellants are in a position to provide some meaningful statistics with regard to the turnover rate among IHOP franchisees. In a survey of what counsel understands is that part of the United States most densely populated with IHOP franchises, the following statistics were compiled (pp. 4-6, Ex. 26, and Exhibits "13", "13A" and "13B" *attached thereto*):

A. As to the average number of franchisees per restaurant—

1. Average number of franchisees per restaurant during period of January 1, 1964 through May 1, 1969 2.075

2. Twelve (12) stores had only one (1) franchisee operator during the subject period, including No. 904 which was permanently closed September 2, 1968, and No. 906, which Defendants took over on June 5, 1967 and never resold. Sixteen (16) stores had two (2) franchisees, nine (9) stores had three (3) franchisees, and three (3) stores had four (4) franchisees.

B. As to the average tenure of franchisees in these restaurants—

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5. At pages 17 and 18 of the Report mention is made of a study concerning the effect of franchising on the economy, on small business, and on franchisor-franchisee relationships to be published by the University of Wisconsin under commission from the SBA. That report, which was scheduled for publication in February, 1971, has not yet been published and is anticipated sometime this Summer. Counsel has requested an advance copy, and may consider filing a supplemental brief, but prefers not to request an extension of time in order to make use of such report in this petition. The activity generated in Congress and in the numerous state legislatures regarding the problems besetting the franchising industry, as herein discussed, speaks for itself.

1. There were a total of sixty-nine (69) new franchisees who were licensed to operate the thirty-nine (39) included restaurants during the period from January 1, 1964 through May 1, 1969.

2. At least thirty-two (32) of the sixty-nine (69) new franchisees were terminated during the subject period. These thirty-two (32) franchisees had an average tenure of 20.23 months.

3. Thirty-seven (37) of the sixty-nine (69) new franchisees were in operation of their store at May 1, 1969. These franchisees had an average tenure of 26.54 months.

4. Seventeen stores had only one new franchisee during the covered period, fourteen stores had two new franchisees, seven stores had three new franchisees, and one store had four new franchisees.

The above statistics are qualified to the extent stated in Exhibit 26. The raw data from which they were compiled was furnished by International.

The Report refers to unreasonable and arbitrary termination of franchise agreements as a common franchisor abuse. (Report, p. 13). To add to those cited before the District Court in Exhibit 26, consider the allegations contained in the complaint in *Beckstead, et al.* v. *International Industries, Inc., et al.*, No. 993376, Superior Court of the State of California in and for the County of Los Angeles. (Ex. 27). In the cited case, eight individuals who are franchised by International to operate restaurants known as The Original House of Pies ("TOHOP"), complaint that International has imposed upon them numerous restraints of trade in violation of California law, such as tying agreements, exclusive purchasing arrangements, price fixing, etc. As in the case on appeal, the Beckstead plaintiffs were each required to sign three integrated and preprinted docu-

ments entitled "Franchise Agreement," "Lease" (or "Sublease") (of the restaurant premises), and "Equipment Lease." It was alleged, in each instance where one of the plaintiffs objected to the various restraints, International, among other things recriminated with notices of default and threatened litigation seeking immediate possession of their restaurants unless the Beckstead plaintiffs agreed to "sell out" to International upon International's unsecured promise to pay them "nominal and inadequate sums of money," International, in fact has taken action against some of the Beckstead plaintiffs who refused International's demand that has resulted in the destruction of their businesses. (Ex. 27, pp. 8-13).

In Helfenbein's brief to the Eighth Circuit he claimed that his efforts to prosecute anti-trust damages would be intentionally frustrated if International would be permitted to pursue its eviction action in state court, citing *Bergen Drug Company* v. *Parke, Davis & Company*, 307 F.2d 725, 728 (3rd Cir.). (App'ts Br., pp. 39, 40). In reply, the Eighth Circuit stated: "Plaintiffs only remotely allude to their potential 'loss or damage' by reason of a violation of the federal law." (App. A, infra, p. A5). If the evidence before the courts below with respect to the site control provisions in the licensing agreements, the admitted exercise by International of control over its franchisees (Ex. 3, pp. 5-7), and the use of such controls against Helfenbein, then we urge consideration of the other evidence more recently revealed in the Beckstead complaint. To say it will be easy for a franchisee undergoing eviction action, much less one who has in fact been evicted from his IHOP Restaurant, to get active IHOP franchisees to testify for him in litigation against International is naive, especially when International selects these franchisees on the basis of their willingness to do as they are told by International. (Ex. 3, p. 6).

Appellants contend that the economic loss wrought by small businessmen franchisees of International alone who have been forced out of business by International, either by unlawful detainer actions, or by threat of same and subsequent repurchase at a bargain price is in and of itself a vast sum. This is made possible by the use of the scheme of integrated agreements that were signed by Helfenbein in the case on appeal, by the Beckstead plaintiffs, and by what Helfenbein contends to be numerous other franchisees of International all over the country, as may be inferred from the data revealed in Exhibit 26.

This Court has previously stated its concern to "recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses" (*Brown Shoe Co.* v. *U. S.*, 370 U.S. 294, 344) is so overriding that anti-competitive conduct "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference in the economy." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212. Even so, as a direct result of site control provisions in franchising contracts such as those in the case on appeal that permit the destruction of "viable, small, locally owned businesses," large franchisors are able to perpetuate their illegal trade restraints at the expense of their individual small businessman franchisees.

The franchisors are able to do this because of the interpretation by the courts below of this Court's decisions in cases such as *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 750 (1947), which held "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them," and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). Both of these decisions were relied upon by the Eighth Circuit herein. (App. A, infra, pp. A1, A5). Helfenbein does not take issue with the validity of the de-

cisions, only with their applicability to the facts in the case on appeal.

Helfenbein is not in any way relying upon the Federal antitrust laws to avoid payment of any indebtedness to International. Reliance upon state laws for such purposes is admitted, but that is entirely irrelevant to the issue.[6] His position is simply that the merits of International's claims supporting International's unlawful detainer action are so integrated with the merits of Helfenbein's antitrust action that it is inequitable and unjust to require Helfenbein to defend an entirely independent action in state courts in order to save his business. There is no reason the eviction issues cannot be raised before the District Court, and decided after full trial on the merits. Helfenbein has an equitable defense to the eviction action in that (1) the delinquencies in payment to International which underlie the action were a direct result of the illegal restraints imposed by International and (2) International was using the eviction action to rid itself of a franchisee who was no longer willing or able to abide by its tying restrictions and resulting overcharges, thereby perpetuating its illegal scheme. To require Helfenbein to have his equitable defense heard in the state courts in effect requires him to try two antitrust cases, and puts him at a severe disadvantage against his much bigger adversary. This is inconsistent with the expressed desire to favor such plaintiffs as a private class of Attorneys General. Further and more importantly, the courts thereby become parties to the prohibited conduct. *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.*, 212 U.S. 227 (1909).

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6. Helfenbein's reliance upon the antitrust statutes of the states of Missouri and Iowa is discussed at pages 23-30 of Appellants' Brief to the Eighth Circuit.

If Helfenbein loses his antitrust case on the merits, he undoubtedly will lose his restaurant. However, if he wins, then he will be entitled to substantial damages, in effect a recoupment of the overcharges that originally put him in a position to be evicted, and he should then be able to set-off or pay any delinquency to International found owed and avoid loss of his business. The injunction sought will not make any indebtedness he may have to International "uncollectible" as comprehended by the decisions in *Bruce's Juices* (supra) and *Kelly* (supra). It will merely defer collection for the equitable purposes stated, thereby permitting him to fully develop his case. *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464.

Franchisees throughout the whole country faced with a predicament similar to that faced by Helfenbein are numerous. They deserve a clarification of this Court's decisions in *Bruce's Juices,* supra, and *Kelly,* supra, that will eliminate the harshness and inequities of such decisions to those in the same boat as Helfenbein.

II.

The Decision of the Eighth Circuit Is in Conflict with the Decisions of This Court and Other Circuits in Holding As Severable the Claims of International for Purportedly Furnished Goods and Services, on the One Hand, and for Illegally Tied Services Which Were Renounced by, and Not Furnished to, Helfenbein, on the Other.

The threatened eviction is based upon nonpayment by Helfenbein of certain charges by International. Some of the charges related to goods and services purportedly furnished, and some relate to illegally tied, unwanted and unfurnished services Helfenbein was required to obtain (but didn't) from International pursuant to renounced provisions in his License Agreement. An essential premise of

the January 14, 1971 decision of the Eighth Circuit (App. A, infra, p. A5) was that International had furnished to Helfenbein all of the goods and services for which he had been charged. The Eighth Circuit's error in this regard was called to that Court's attention in appellants' Petition for Rehearing at pages 1 and 2. The Eighth Circuit's order denying rehearing stated (App. B, infra, p. A8):

> "* * * Plaintiffs assert that the amounts due for rent, franchise payments and services received are *inseverable* from defendants' claim for payment for the alleged illegal tie-in requirements. We disagree. Plaintiffs have offered to pay for these items, both in the trial court and in this court, on the condition that an injunction issue to prohibit arbitration and eviction arising from the default on the other amounts contested. This offer serves as ethical proof of severability. Plaintiffs' original complaint (paragraph No. 33) demonstrates that their initial refusal to pay for rent, franchise payments, goods and services received arises from many other factors. It is obvious that plaintiffs early attempted to coercively use its refusal to pay past due accounts in order to preemptorily relieve themselves of the alleged tie-in requirements. To now allow plaintiffs to pay conditional on the grant of an injunction would make this court a party to that coercion. This we refuse to do."

The foregoing statement requires correction. Appellants' offer was as follows:

> "* * * to pay up all past due premises rent, equipment rent, and franchise fee payments, to keep current on these items and on all other sums due the International parties for purchase of food and restaurant supplies, and to post a $10,000 bond, if the court would restrain eviction from the Kansas City restaurant only and would restrain the institution of arbitration proceedings against all the Helfenbein parties. (A. 77, 78)."

(App'ts Br., pp. 12, 13). The past due premises rent has been paid (Ex. 28), and arbitration is no longer at issue. The offer was originally made as a *suggestion* to the District Court of a means of achieving equity, keeping in mind the power of that court to prescribe conditions for any injunction that it might issue. The delinquency occurred, as previously stated, as a direct result of the burden on Helfenbein of paying International the overcharges arising out of the illegal tying arrangements. The hearing at which counsel made the above-quoted statement occurred over one year after Helfenbein renounced the illegal tying requirements. He had been able to accumulate some funds during that period, and was then in a position to make the suggestion. The Eighth Circuit apparently thought counsel was wrong to adopt these tactics. The alternative would have been to pay up the delinquencies as promptly as money could be accumulated, despite the constant threat of eviction from Helfenbein's only source of livelihood, and the prospect that he might be compensated for his loss only after engaging in protracted and expensive litigation with International, a multi-million dollar corporation. And the money could have been accumulated only if Helfenbein continued to forego payment for the renounced services. These tactics could hardly be called "coercion."

Helfenbein's contention is and was that International's claims for furnished goods and services and their claims for unfurnished services are inseverable for purposes of determining whether or not International should be enjoined from evicting Helfenbein from the Kansas City restaurant. If one of the substantial reasons for the proposed eviction is nonpayment of the claims for the illegally tied and unfurnished services, then eviction should be enjoined. (App'ts Br., pp. 36, 37). The Eighth Circuit holding that such claims are severable is in conflict with:

(a) The following cases, all discussed at pages 35 and 36 of appellants' brief to the Eighth Circuit, and all holding that the use of otherwise legal site control provisions in contracts is an illegal means of effecting anti-competitive results: *F.T.C.* v. *Texaco, Inc.*, 393 U.S. 223, 227; *Simpson* v. *Union Oil Co.*, 377 U.S. 13; *Sahm* v. *V-1 Oil Company*, 402 F.2d 69 (10th Cir.); and *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.); and

(b) the following cases, all discussed at pages 36 and 37 of appellants' brief to the Eighth Circuit, and all holding to the effect that, in order to prove causation in a Federal antitrust treble damage action, it is normally sufficient to prove that the defendant materially contributed to plaintiff's injury: *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 702; *Momand* v. *Universal Film Exchanges, Inc.*, 172 F.2d 37, 43 (1st Cir.), cert. denied 336 U.S. 967; and *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798, 805-806 (1st Cir.).

Appellants recognize that all of the above decisions deal with damage suits and not with temporary injunctions. In that respect only this case is novel to those cited. But must a franchisee have both the ability and willingness to pay a franchisor currently for all goods and services pendente lite in order to avoid unlawful detainer litigation in state courts that in any event will tend to sap his strength and resources, and may lead to his eventual removal from his only source of livelihood, while he litigates his antitrust claims in the Federal courts? This Court has declared its policy of granting certiorari where rulings by a court of appeals "threaten the effectiveness of private action as a vital means of enforcing the antitrust policy of the United States." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 136. See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.* ..... U.S.

..... (1971). The decisions of the courts below certainly do threaten the effectiveness of private action by all franchisees in the position of Helfenbein, and we suggest there are many, as evidenced by the foregoing comments in this petition.

A decision by this Court resolving the inconsistencies between the decisions of the courts below with the cited decisions of this Court and various appellate courts is needed as a guide to the numerous other franchisees who are victims of contracts of adhesion with their franchisors on the procedures they should follow if they find themselves in the same boat as Helfenbein, and a favorable decision to Helfenbein will help stem the substantial economic losses of these small businessmen who have been forced by their franchisor-landlord out of their franchises, either by means of eviction or forced sale at disadvantageous terms.

CONCLUSION

This case is illustrative of the turmoil existing today in the franchising industry, especially with regard to the wrongful termination of franchises and eviction of franchisees by franchisors. Here the termination and eviction is wrongful because: (1) Helfenbein was so burdened with overcharges arising out of the illegal tying requirements of International that he could not timely pay his premises rent and other financial commitments to International; and (2) the attempted termination and eviction are in substantial part, attributable to Helfenbein's unwillingness and former inability to continue to bear the burden of the illegal tying requirements, which he renounced. The use of otherwise legal procedures, here franchise termination and unlawful detainer action in state court, to

enforce International's claim for payment for goods and services furnished, is inseverable from the overcharges that initially caused Helfenbein's delinquencies, and his renunciation of the tied services that were not furnished.

Small businessmen franchisees are suffering substantial losses as a result of wrongful termination of their franchises, and the courts below require guidance from this Court on methods of achieving fair and just results in litigation arising out of such terminations. Of equal importance is the need to resolve the inconsistencies of the decision in the case on appeal with other decisions of this Court and other circuits.

The issues raised in this case are therefore deserving of the attention of this Court.

Respectfully submitted,

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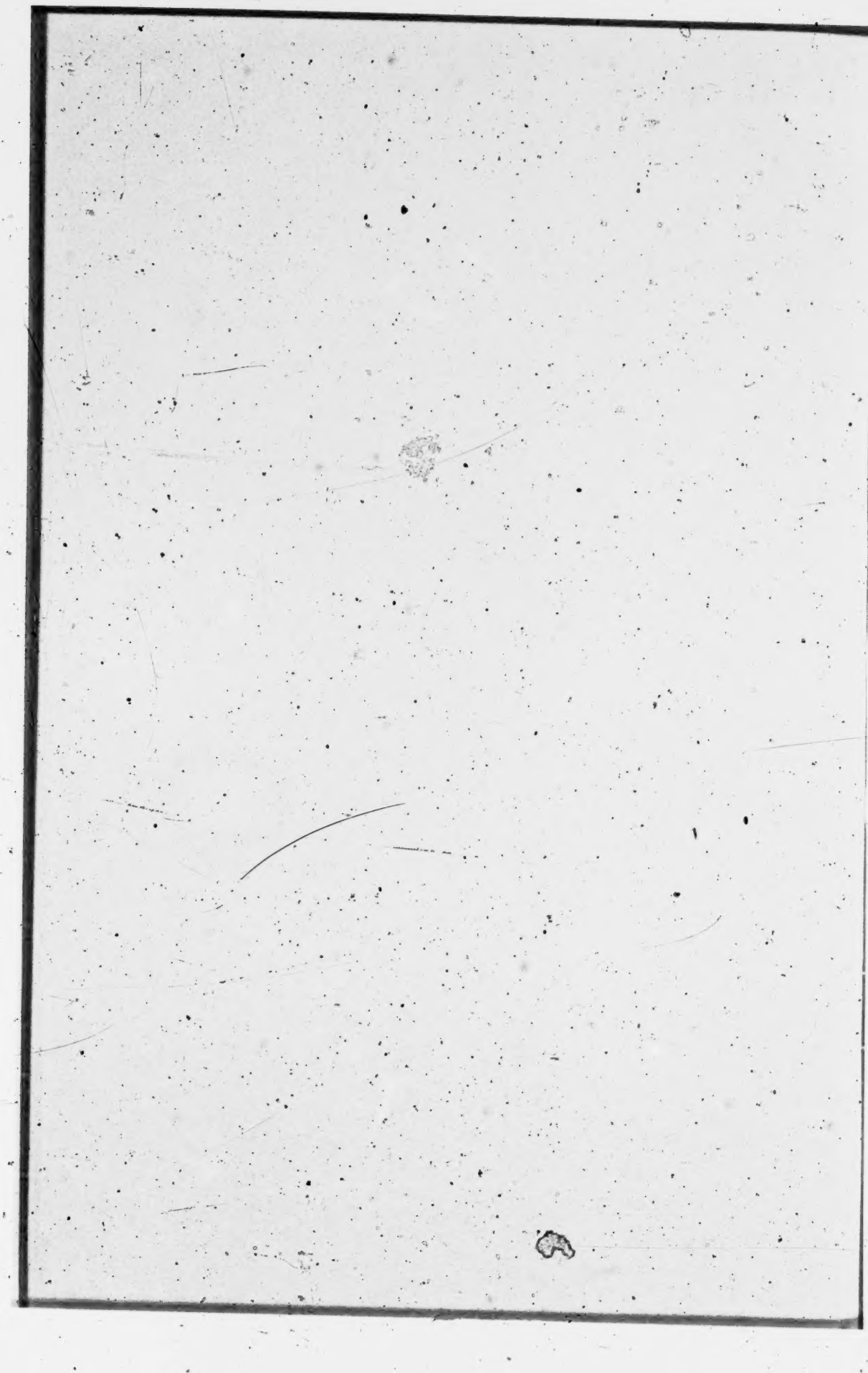

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,245

Robert J. Helfenbein and Circle Investments of Missouri, Inc., Appellants,

v.

International Industries, Inc., et al., Appellees.

No. 20,246

Robert J. Helfenbein and Crescent Investments of Iowa, Inc., Appellants,

v.

International Industries, Inc., et al., Appellees.

Appeals from the United States District Court for the Western District of Missouri.

[January 14, 1971.]

Before MATTHES, Chief Judge, LAY, Circuit Judge and REGISTER, District Judge.

LAY, Circuit Judge.

Suits for treble damages for alleged violation of §§ 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2) and § 3 of the Clayton Act (15 U.S.C.A. § 14) have been filed in the United States District Court for the Western District

of Missouri against the defendants International Industries, Inc., I.H.O.P. of Cook County, Inc., and International House of Pancakes of Arizona, Inc. (hereinafter grouped as International. The plaintiffs, Robert J. Helfenbein and his wholly owned corporations Circle Investments of Missouri, Inc. and Crescent Investments of Iowa, Inc., subleased restaurants and equipment from International under franchise agreements. Plaintiffs assert that the leases require tie-in agreements which violate both federal and state antitrust laws. The plaintiffs Helfenbein and Circle Investments opened a restaurant in Kansas City, Missouri, under the above agreements in January 1967; Helfenbein and Crescent Investments commenced a similar operation in Des Moines, Iowa, in December 1965. On or about May 19, 1969, defendants evicted plaintiffs from their restaurant premises in Des Moines by means of an unlawful detainer action in the Iowa state courts. A similar unlawful detainer action in the State of Missouri has been threatened relating to the Kansas City premises. In addition, it is alleged that the defendants have demanded that plaintiffs, under the terms of their lease agreements, submit to arbitration in Los Angeles, California all amounts purportedly due defendants for various items including rent, equipment use, and goods and services furnished plaintiffs in the past. The instant appeal arises because of the district court's refusal to grant a preliminary injunction against the defendants enjoining the arbitration proceedings as well as the threatened unlawful detainer action in state court. We affirm the district court's action.

The arbitration proceedings requested concern the amount allegedly due the defendants for the: (1) unpaid balance of principal and interest on a promissory note executed by Robert J. Helfenbein; (2) unpaid and past due amounts on two equipment leases; (3) unpaid and past

due rent on two subleases of restaurant premises; (4) unpaid and past due amounts for goods sold and delivered; (5) unpaid and past due management services fees; and (6) unpaid and past due advertising fees. The total amount exceeds $87,200. There appears to be little or no dispute over the items or the amount involved. Plaintiffs object to the arbitration procedures in Los Angeles because they fear that they will lose their right to assert the defense of invalidity of the contracts under state laws. In Missouri, as well as Iowa, there exist penalty provisions attached to violations of the restraint-of-trade laws purportedly making the contracts void and unenforceable. See Mo. Ann. Stat. §§ 416.010-.050 (1952); and Iowa Code § 553.1 (1966). Plaintiffs properly urge that arbiters have no jurisdiction to pass upon the substantive aspect of the antitrust laws. *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F. 2d 821 (2 Cir. 1968); *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F.2d 710 (9 Cir. 1968). The difficulty in reliance on these cases is, however, they in no way suggest an irreparable harm to plaintiffs so as to enjoin the arbitration procedure if needed.[1] Once the matter is arbitrated, the sum so determined must still be pleaded in a court of competent jurisdiction and reduced to judgment to enforce collection. Plaintiffs may at that time urge whatever defenses to the arbitration award they might have under the antitrust laws.[2] Under these circumstances a tem-

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1. The parties at oral argument indicated that they were agreeable to a stipulation that arbitration may be waived. Under these circumstances the claimed amounts may be asserted in the counterclaim of defendants. This stipulated procedure seems more sensible and beneficial to both parties, especially if there exists no real dispute as to the amount or the items involved.

2. The court in *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 828 (2 Cir. 1968), said:

"This does not mean that we rule out arbitration of all aspects of this dispute. It does mean that the district court erred in

porary injunction need not issue to enjoin the arbitration. By our ruling we do not entertain the questions as to the effect or proper application of any state law to the present facts. The case is not yet ripe for determination of these issues.

Plaintiffs additionally urge that unless a preliminary injunction issues to enjoin their eviction from the restaurant premises, they will be denied their statutory defense provided under state law. The argument is made that once the claims are paid it will be too late to obtain any benefit from these defenses. However, the threatened eviction is premised upon the plaintiffs' default in payment for the various items previously listed including a default on the promissory note given as part of the initial consideration for the franchise and rent for the premises and equipment. Admittedly there exists no defense as to these items under the state laws.[3] The contract lease between the parties is clear and unequivocal that any default thereunder may subject plaintiffs to summary eviction. Under these circumstances there exists no equitable ground or authority for the federal courts to intervene. Furthermore, plaintiffs have not lost their *right* to raise these defenses once the defendants assert their claim.

There exists additional reason for denying injunctive relief. There is no authority under the federal antitrust laws to enjoin state enforcement or remedy for collection of ordinary debts incurred for goods delivered or services

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submitting to the arbitrators 'the issue as to the validity' of the License Agreement insofar as that empowered the arbitrators to decide issues of antitrust law. . . . *If such violations are not a defense, the arbitration might promptly proceed within defined limits, leaving it to the arbitrators to decide what goods were so sold.*" (Emphasis ours.)

3. Plaintiffs offered to pay these items if the trial court would enjoin arbitration and eviction proceedings as to the default on the other amounts contested.

rendered. As the Supreme Court said in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 750 (1947): "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them." See also *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). Injunctive relief under § 16 of the Clayton Act (15 U.S.C.A. § 26) may issue only for "loss or damage" by reason of a violation of the federal antitrust law. Plaintiffs only remotely allude to their potential loss or damage under federal law. However, there is no attempt in either the arbitration or eviction proceedings to enforce the very conduct (that is, the tie-in sale) prohibited by the Clayton or Sherman Act. Cf. *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.*, 212 U.S. 227 (1909). The gravamen of plaintiffs' "loss or damage," as alleged and argued here, if the eviction is not stayed, is their concern over losing their defenses allegedly provided by *state law*. As indicated this "loss" does not flow from any sanction under federal law. Under these circumstances this alleged "loss" cannot be the basis of injunctive relief under 15 U.S.C.A. § 26. If not authorized under § 26 injunctive relief cannot otherwise issue. 28 U.S.C.A. § 2283.[4]

There is no question that plaintiffs have received the goods and services (some assertedly unwanted) and the use of the premises and equipment in question. Perhaps plaintiffs have a valid defense to some of these claims if they do arise from a contract deemed illegal by state law. However, assuming they do, it is difficult to reason that defendants do not have a legal basis to evict the plaintiffs for failing to pay for items such as rent, franchise payments, etc., which are admittedly not challenged as being

4. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C.A. § 2283.

invalid. There is no evidence that the eviction proceeding is based upon plaintiffs' refusal to continue to buy according to any tie-in agreement. The essence of plaintiffs' complaint is that the state court action arises from their failure to pay for what they have received.

The order denying injunctive relief is affirmed and the case remanded for further proceedings on the issues joined.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,245

Robert J. Helfenbein and Circle Investments of Missouri, Inc.,
Appellants,
v.
International Industries, Inc., et al.,
Appellees.

No. 20,246

Robert J. Helfenbein and Crescent Investments of Iowa, Inc.,
Appellants,
v.
International Industries, Inc., et al.,
Appellees.

[March 4, 1971.]

Before MATTHES, Chief Judge, LAY, Circuit Judge, and REGISTER, District Judge.

PER CURIAM.

On motion for rehearing plaintiffs have urged that this court's original opinion overlooked the fact that a substantial portion of the defendants' claim arises from management services unwanted and *unfurnished*. The last sentence of this court's opinion reads: "The *essence* of plaintiffs' complaint is that the state court action (for

eviction) arises from their failure to pay for what they have received." (Emphasis ours.) The eviction notice served upon the plaintiffs on March 5, 1969, and the entire record satisfies us that our analysis was correct. Plaintiffs assert that the amounts due for rent, franchise payments and services received are *inseverable* from defendants' claim for payment for the alleged illegal tie-in requirements. We disagree. Plaintiffs have offered to pay for these items, both in the trial court and in this court, on the condition that an injunction issue to prohibit arbitration and eviction arising from the default on the other amounts contested. This offer serves as ethical proof of severability. Plaintiffs' original complaint (paragraph No. 33) demonstrates that their initial refusal to pay for rent, franchise payments, goods and services received arises from many other factors. It is obvious that plaintiffs early attempted to coercively use its refusal to pay past due accounts in order to preemptorily relieve themselves of the alleged tie-in requirements. To now allow plaintiffs to pay conditional on the grant of an injunction would make this court a party to that coercion. This we refuse to do.

This issue might have been ripe for proper adjudication had plaintiffs timely paid the amounts due and owing which by their belated offer to pay they concede are not related to the alleged tie-in sales. Plaintiffs made their choice of strategy. Aside from the merits, we deem it inequitable and totally collateral to the enforcement of antitrust policy to issue injunctive relief upon the conditions which they propose.

Motion for rehearing is denied.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

ORDER

(Filed February 17, 1970)

Plaintiffs in these consolidated cases, which are suits for damages for alleged anti-trust violations by defendants, also pray for preliminary injunctions.

Plaintiffs in each case hold a franchise from defendants under which they operate a restaurant. They lease the buildings and most of the fixtures from the defendants. In addition, they have contracted to pay management and advertising fees, based on a percentage of gross business, and they are delinquent on all these payments, as well as on some open accounts for supplies purchased for defendants.

The contract between the parties provides for arbitration of disputed matters arising from the contract. Plaintiffs allege that defendants are threatening to institute arbitration proceedings on the past due items, and are threatening to institute state court actions to recover possession of both the leased real and personal property. Plaintiffs seek a preliminary injunction restraining defendants from instituting any of these actions.

The plaintiffs have paid $65,000 for the two franchises. If evicted from the premises, this will be a complete loss. Plaintiffs contend that the defendants' conduct in pursuing an alleged policy of tie-in-sales, horizontal price-fixing, and vertical price-fixing have made it impossible for plaintiffs to make all these payments out of the business; that the violations of the anti-trust laws by the defendants

are part of an overall scheme initiated with the sale of the franchise; and that legal actions to enforce and collect any debts arising from the contractual relations between the parties should be enjoined until their claims for damages are determined.

At the outset, the plaintiffs are faced with the decision of the Supreme Court in the case of *Kelly* v. *Kosuga*, 385 U.S. 516 (1959). In that case the Court said that in a suit on a contract:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by the purchaser in an action to recover from him the agreed price of goods sold."

The Court explained *Continental Wall Paper Co.* v. *Voight & Sons*, 212 U.S. 227 (1909), as holding that the defense only applied when a contrary judgment would be enforcing the actual or precise conduct rendered unlawful by the anti-trust laws.

In this case, the Court cannot find that the payment of rent under a lease, or the payment of a management fee, for example, would constitute conduct rendered unlawful by the anti-trust laws.

There is still another reason that plaintiffs are not entitled to an injunction. It is undisputed that plaintiffs must show that irreparable harm would result if the injunction is not granted. Plaintiffs argue that losing their going businesses, the restaurants, would constitute such harm because you cannot place a value on a business which the seller does not wish to sell.

This is not the law. In these suits plaintiffs can recover, if successful, all their damages *trebled,* plus their aatorneys' fees. There is no suggestion that defendants are not solvent and responsible in damages.

For the foregoing reasons, it is

ORDERED that plaintiffs' prayer for a temporary injunction in each of the above cases be, and is hereby, denied.

/s/ Wm. R. Collinson
District Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-233

~~No. 1777~~

ROBERT J. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC.,
Petitioners,

vs.

INTERNATIONAL INDUSTRIES, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1777

ROBERT J. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC.,
Petitioners,

vs.

INTERNATIONAL INDUSTRIES, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

Commencing with their statement of the Questions Presented (Pet., p. 2) and continuing throughout their brief, petitioners have raised issues which were not before either the District Court or the Court of Appeals for the

Eighth Circuit and have thereby sought to raise issues well beyond the very narrow question presented here. The sole issue, which is pertinent here, before the District Court and the Court of Appeals was whether under 15 U.S.C. §16 a preliminary injunction would issue to prevent a franchisor from recovering possession of a restaurant where the franchisee was in default in the payment of obligations to the franchisor and where such defaults would give the franchisor the right to possession. The question here is whether, under 28 U.S.C. §1254(1), some special and important reason has been shown for this Court to review on certiorari the decision of the Court of Appeals. For the sake of putting the issues into proper perspective, we think it appropriate to consider the posture of this case as it has developed.

Petitioners' complaint purports to charge a diversity of violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act (15 U.S.C. §§1, 2, 14). Taking the most liberal construction of the complaint, the alleged violations fall into the following categories:

(1) Alleged tying arrangements in connection with the purchase or lease of (a) restaurant furniture, fixtures and equipment; (b) restaurant foodstuffs and supplies; (c) advertising; (d) insurance; (e) management services (A. 12).

(2) Alleged horizontal price-fixing by conspiracy between respondents (as purchasers of foodstuffs and supplies) and certain unnamed and unidentified suppliers (as sellers of foodstuffs and supplies) (A. 13).

(3) Vertical resale price maintenance (A. 13).

(4) Alleged violation of Section 2 of the Sherman Act by monopolization of the market for family-type restaurants (A. 12).

(5) Alleged violation of the antitrust laws of the State of Missouri (A. 19).

With specific reference to petitioners' contentions respecting eviction, which is the sole issue raised here, the complaint in paragraph 23(f) contains the following allegation:

> "That defendants required said franchisees, including plaintiffs to agree to arbitration of all disputes in Los Angeles, California, with the proviso that defendants may evict franchisees to recover possession of their restaurant premises by means of legal process without resort to arbitration proceedings." (A. 13).

The complaint in paragraph 28, in part, alleges the following:

> ". . . . The right reserved by defendants to summarily evict plaintiffs and to arbitrate all disputes between the parties are parts and parcels of a scheme designed to aid defendants' action and participation in a combination and conspiracy in restraint of trade and commerce." (A. 18).

Paragraph 34, in part, alleges:

> "Defendants use and intend to use summary eviction and arbitration procedures to perpetuate their scheme and actions in restraint of trade in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, as aforesaid." (A. 20-21).

As conceded on brief by petitioners (Court of Appeals Brief of Appellants, pp. 12-13), petitioners are substantially indebted to respondents (herein sometimes, "International") in an amount exceeding $87,000 (as of March 31, 1969) for sums due under each of the following categories of indebtedness:

(1) Unpaid balance of principal and interest on promissory note of Robert J. Helfenbein ("Helfenbein") given to acquire the franchise (Ex. 1, p. 2; A. 61);

(2) Unpaid and past due amounts on equipment lease executed by Helfenbein covering equipment used by him in the restaurant in Kansas City, Missouri (Ex. 1-D; A. 61);

(3) Unpaid and past due amounts for goods sold and delivered to Helfenbein and used by him at the Kansas City restaurant;

(4) Unpaid and past due management service fee (based on 5.2% of gross sales) as provided for under the License Agreement executed by Helfenbein (Ex. 1-B; A. 61).

(5) Unpaid and past due advertising fees (based on 1% of gross sales) provided for under the License Agreement executed by Helfenbein.

Petitioners filed a motion, pursuant to Section 16 of the Clayton Act (15 U.S.C. §26), seeking a preliminary injunction, first, to enjoin International from exercising its arbitration rights (there being no dispute that the licensing documents entered into between the parties evidenced "a transaction involving commerce," and that portion of the License Agreement providing for arbitration of all disputes, under 9 U.S.C. §2 was "valid, irrevocable, and enforceable") and, second, to prohibit International from seeking to evict petitioners from the restaurants in Des Moines, Iowa, and Kansas City, Missouri.

At a hearing before the United States District Court for the Western District of Missouri on April 9, 1969, petitioners presented their "evidence" which consisted solely of the oral arguments of counsel, two affidavits and certain other exhibits which are contained in Appellants' Ex-

hibits (as filed by petitioners with the United States Court of Appeals for the Eighth Circuit). The District Court, upon consideration of the "evidence" presented to it, together with the briefs of the parties, relying upon this Court's decision in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), held that neither arbitration nor unlawful detainer as contemplated by International constituted conduct rendered unlawful under the antitrust laws. This was the decision of the District Court (App. C) based upon reflection and study and not upon the off-the-bench (and unsupportable) comment said by petitioners to be the trial court's "finding" of a substantial likelihood of success by petitioners on the merits (Pet., p. 6).

The Court of Appeals affirmed the District Court's decision and found ". . . there is no attempt in either the arbitration or eviction proceedings to enforce the very conduct (that is, the tie-in sale) prohibited by the Clayton or Sherman Act." (App. A, p. A5).

Petitioners' motion for a preliminary injunction both before the trial court and the Court of Appeals was based *solely* upon Section 16 of the Clayton Act and did not, as petitioners suggest (Pet., p. 4), rely upon the Court's general equitable powers.

Neither the District Court nor the Court of Appeals distinguished between arbitration and eviction in applying the *Kelly* case. The application of its principles was held to be the same whether applied to International's proposed unlawful detainer action or to pursuit of its pending claim for arbitration seeking an award for amounts owed by petitioners to International. Fatally inconsistent, therefore, is petitioners' abandonment of its challenge to International's effort to pursue arbitration (Pet., p. 5). Acquiescence in that part of the Eighth Circuit's opinion holding

that arbitration was permissible, necessarily involves acquiescence in that part of its opinion approving, under the principles of the *Kelly* case, the institution of unlawful detainer by International.

Petitioners' claim (Pet., pp. 6-7) that overcharges by International caused petitioners to be unable to honor their financial obligations flies in the face of the findings of the Court of Appeals. On the issue of the supposed "overcharges", the Court of Appeals initially observed:

> "There is no evidence that the eviction proceeding is based upon plaintiffs' refusal to continue to buy according to any tie-in agreement. The essence of plaintiffs' complaint is that the state court action arises from their failure to pay for what they have received." (App. A, p. A6).

In overruling petitioners' motion for rehearing, the Court of Appeals further stated:

> "Plaintiffs' original complaint (paragraph No. 33) demonstrates that their initial refusal to pay for rent, franchise payments, goods and services received arises from many other factors. It is obvious that plaintiffs early attempted to coercively use its refusal to pay past due accounts in order to preemptorily relieve themselves of the alleged tie-in requirements. To now allow plaintiffs to pay conditional on the grant of an injunction would make this court a party to that coercion. This we refuse to do." (App. B, p. A8).

The "unrebutted evidence" referred to by petitioners (Pet., p. 7) of overcharges and inability to pay obligations consists of affidavits by Robert J. Helfenbein and his accountant, Mathew T. Kearney (Exs. 1, 2; A. 61-62), neither of which was or now is entitled to serious consideration.

The Helfenbein affidavit (Ex. 1) is replete with "beliefs", conclusions and speculations, none of which is sup-

ported by competent evidence. Essentially this affidavit sets forth a series of arguments, claims and allegations. It alleges that prices charged to Helfenbein were higher than charges made by competing suppliers. In this respect the affidavit does not refer to any competent evidence of claimed overcharges but, rather, to a summary of purported overcharges prepared by Helfenbein's accountant, Kearney (Ex. 2; A. 62). The Helfenbein affidavit ties into these overcharges by stating that "[s]ome of the figures were *estimated* with my help" (Ex. 1, p. 3). Helfenbein then elaborates upon those "estimated" overcharges and concludes with the allegation that he was financially unable to meet his obligations. The Kearney affidavit, in turn, shows that it was made at the behest, not only of Mr. Helfenbein, but also of Mark J. Klein, one of petitioners' attorneys, who was active in its preparation. The Kearney affidavit shows that most of the background material for the preparation of the estimates came from "counsel for plaintiffs". In fact, the Kearney affidavit states:

> "The theory of computing the overcharge estimates is based upon opinion of counsel for plaintiffs. Since the figures used are based upon unaudited books and records and upon estimates, I accordingly cannot express an opinion on them." (Ex. 2, pp. 1-2).

Thus we have a round-robin series of allegations, charges and estimates emanating principally from counsel for petitioners and ending with Kearney who candidly states in his affidavit that he will not express an opinion as to those speculations and conclusions.

Irrespective of the various excuses for nonpayment of the various items, the fact remains that the indebtedness owed as of March 31, 1969, totaled some $87,200 (Court of Appeals Brief of Appellants, p. 12).

Finally (Pet., p. 7), petitioners make reference to the fact that the Helfenbein restaurant is now prospering and set forth a summary of exhibits which purport to reflect this prosperity. Although this is easily understandable in light of the fact that Helfenbein does not pay his bills and obligations, we take note of this comment for yet another reason.

Petitioners refer at the end of page 7 (and also on page 5) to a series of new exhibits (Exs. 16 through 29) which have been separately furnished by petitioners to this Court. None of the exhibits shown as numbers 16 through 29 was before either the District Court or the Court of Appeals. None of these supposed "exhibits" constitutes a part of the record of this case on application for writ of certiorari. To be candid, we were startled at receiving and later reading extensive argument and comment in petitioners' brief with respect to these new exhibits. Petitioners have failed to cite any authority for enlarging the record of this case for their petition, and we know of none which would offer any support for this audacious and presumptuous practice. The case may not be considered on petition on any record different from that on which it was originally submitted to the District Court. E.g., Rule 12, U.S. Sup. Ct. Rules. Parenthetically, we note, however, that many of the new exhibits would have been objectionable even had they been initially presented to the trial court.

We make, however, one comment with respect to Exhibit 27 which purports to be a copy of an existing complaint in a case which was filed in the Superior Court of the State of California in and for the County of Los Angeles and titled, *Beckstead, et al.* v. *International Industries, Inc., et al.*, No. 993376. We are filing with this Court a copy of the Clerk's Docket Sheet, attested to by him which shows

that, on May 28, 1971, the complaint in *Beckstead* was dismissed on demurrer. We make this comment in view of the extensive discussion of *Beckstead* by petitioners (Pet., pp. 15-17), and petitioners' failure to advise this Court of the dismissal of the *Beckstead* complaint.

We know of no good reason why we should dignify or recognize this practice by commenting further upon the considerable portions of the brief devoted to an exposition of these new exhibits. Throughout this brief, therefore, we will deal with the case on the basis of the record as it was reviewed by the Court of Appeals and will not further comment upon the new exhibits (16-29) which are discussed, commencing on page 7 of petitioners' brief and which thereafter make up the entire basis and subject matter of the text of petitioners' brief, with minor exceptions, from pages 9 through 17.

ARGUMENT

I.

Petitioners Have Failed to Establish a Conflict with Decisions of This Court or of Any of the Courts of Appeal Because Petitioners' Motion for a Preliminary Injunction Was Properly Denied in That the Remedy of Unlawful Detainer Is Not in Furtherance of Alleged Violations of the Antitrust Laws.

Petitioners have failed to set forth that specific part of Rule 19 of this Court on which they rely. We take it that petitioners' main contention is that the decision of the Eighth Circuit in this case in some manner conflicts with certain decisions of this Court, including *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947) and *Kelly* v. *Kosuga, supra.* We are unable to determine the precise nature of petitioners' contention in this regard. On pages 17 and 18, petitioners lead us to believe that they

do not question the validity of those decisions, but merely their application to the facts of this case (no effort is made, however, to distinguish *Bruce's Juices* or *Kelly* from the facts of this case). Yet, on page 19, petitioners tell us that they seek a "clarification" by this Court of its decisions in *Bruce's Juices* and *Kelly* to "eliminate the harshness and inequities of such decisions . . . ." Finally, on page 24, petitioners tell us ". . . the courts below require guidance from this Court on methods of achieving fair and just results in litigation arising out of such terminations." These latter two statements lead us to believe that petitioners, *sub silento*, are claiming that this Court erred in its decisions in *Bruce's Juices* and *Kelly*.

Even assuming that petitioners do not question the validity of those decisions, their contention is somewhat difficult to grasp. On page 18 petitioners tell us that they are not "in any way relying upon the Federal antitrust laws to avoid payment of any indebtedness . . . ." Petitioners tell us that their reliance is on state laws but, as petitioners themselves recognize, ". . . that is entirely irrelevant to the issue." Then petitioners tell us that their main position is that the merits of their claims (which are antitrust claims) "are so integrated" with the merits of International's eviction action "that it is inequitable and unjust to require Helfenbein to defend an entirely independent action in state courts in order to save his business." The latter position necessarily conflicts with the former, and makes it difficult to know which position is in fact relied upon. We will, however, discuss our understanding of the *Kelly* and *Bruce's Juices* cases and what we submit is the severability of the claims of International for nonpayment of the various items specified from any antitrust issue which petitioners have raised.

Second, with specific reference to Rule 19, we take it that petitioners claim that the decision of the Eighth Circuit conflicts with other decisions of this Court and, further, with decisions of other courts of appeal. We gather that this is the tenor and purpose of the petitioners' discussion on pages 21 to 23 of their brief.

With these preliminary observations in mind, we will discuss the issues relevant to Rule 19 *seriatim*.

A.

In View of the Substantial Indebtedness Owed by Petitioners to International, International, under the Kelly Doctrine, Is Entitled to Proceed with Appropriate State Remedies to Secure Possession of Its Restaurant Premises in Kansas City, Missouri.

The indebtedness of petitioners arises in the various categories specified above and under the terms of the various contractual agreements between the parties. The basic agreement between the parties is the License Agreement and the franchising program arising from that agreement (Ex. 1-B; A. 61). From this License Agreement there flows a sublease of the restaurant premises at 6501 Troost Avenue in Kansas City, Missouri (Ex. 1-F; A. 61). This is a separate contractual obligation and transaction. Additionally, the parties have executed a separate lease of restaurant equipment (Ex. 1-D; A. 61). There is a separate promissory note (on which principal and interest is unpaid), collateral and ancillary to the License Agreement for the Kansas City restaurant. Respondents' claim for amounts owing on account of goods sold and delivered is wholly collateral to the License Agreement. The amounts due respondents for management service fees, advertising fees are for amounts already past due and, hence, are

wholly collateral and severable from the License Agreement.

We think that *Kelly* v. *Kosuga, supra,* is decisive in permitting respondents to maintain appropriate state remedies to recover possession of the Kansas City restaurant premises.

In that case, when sued for the balance of the purchase price, Kelly pleaded, as do petitioners here (A. 18) that the contract was part of a scheme in violation of the Sherman Act. According to defendant's affirmative defense in *Kelly*, plaintiffs had approximately 600 carloads of onions stored in the Chicago area and another 400 around the country. In a series of meetings, plaintiffs made known to Kelly and other onion growers that these onions would be sold in such a manner as to depress both the futures and cash market price unless the defendant and other growers would purchase a part of plaintiffs' onions. Defendant's purchase was part of an agreement whereby 287 carloads of onions were purchased in return for plaintiffs' promise not to place onions on the futures market for the balance of the 1955-1956 trading season.

The defendant in *Kelly,* as do petitioners here (Pet., p. 18), relied upon *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.,* 212 U.S. 227 (1909), in support of his contention that the defense of illegality should be allowed whenever the contract in question contains terms violative of the Sherman Act. *Continental* was before this Court on a demurrer which made certain admissions deemed fatal by the Court:

> "It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with

effect of both restraining and monopolizing trade and commerce among the several States." (l.c. 261). [Emphasis in original].

This Court in *Kelly* explained *Continental* as holding that enforcement of contracts would be refused only when the judgment of the Court would itself be enforcing the precise conduct rendered unlawful by the Act. "The scope of the defense of illegality under the Sherman Act goes no further." (358 U.S. at 520). This Court in *Kelly* further stated:

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' . . . Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation . . . is avoided by treating the defense as so confined." (358 U.S. at 520-521).

With specific reference to a private antitrust action, rather than reflecting the desired status of a private class of attorneys general urged by petitioners on page 18, this Court stated:

> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general." (358 U.S. at 520).

This Court in *Kelly* essentially relied on its previous decision in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), where the Court held that the fact that the plaintiff was an illegal trust in restraint of trade did not constitute a defense to an action for the price of goods sold and delivered.

Further authority for the *Kelly* decision was *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165 (1915). Corn Products sold merchandise to Wilder with the standing offer to give Wilder a rebate if it bought exclusively from it. There this Court stated:

> ". . . it results not only that there is no support afforded to the proposition that the Anti-Trust Act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but on the contrary that the provisions of the act add cogency to the principles of general law on the subject and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view. . . ." (l.c. 176).

In *Kelly*, this Court found the sale to be an intelligible economic transaction separate from any illegal act, so that it was not necessary to supply any judicial sanction, especially in terms of a defense not provided for in the Sherman Act. It was made clear that the avoidance of private contracts as an indirect judicial remedy under the Sherman Act is very limited in scope so that creation of "a very strange class of private attorneys general" could thus be avoided.

Petitioners seek to avoid the decisive holding of *Kelly* by the following contention:

> "Helfenbein's contention is and was that International's claims for furnished goods and services and their claims for unfurnished services are inseverable for purposes of determining whether or not International should be enjoined from evicting Helfenbein from the Kansas City restaurant." (Pet., p. 21).

Essentially, petitioners would seek this Court to ignore the separateness of the documents and transactions and debts

involved and to ignore the cogent analysis of separateness expressed in the view of Justice Holmes who, in his dissent in the *Continental* case, stated:

> "It is said that the specific sales, the general agreement and the original combination all are steps in one illegal plan, and that the plan gives character to the whole. But we must be more precise. . . . The plaintiff's unlawful purpose did not make it unlawful to buy the plaintiff's goods." (212 U.S. at 270).

Petitioners attempt the same sort of imprecise characterization by alleging that the assertion of their rights by respondents under state is "parts and parcels of a scheme" in violation of the antitrust laws. This, then, must be the basis for petitioners' argument as to the supposed inseverability of the indebtedness from the antitrust issues. We submit that this simply will not do.

In this case there is no dispute that Helfenbein executed the License Agreement. Nor is there any dispute that he executed a promissory note in connection with the License Agreement, on which there is a substantial amount of principal and interest remaining unpaid. He concedes this in his affidavit (Ex. 1, p. 2; A. 61). Amounts due under the lease of equipment and the promissory note are all collateral to and severable from the License Agreement. Certainly respondents should not be precluded from asserting their claims under state law for the unlawful detention of the restaurant premises because of nonpayment of the various items referred to in the contract documents. All of these matters are separate transactions, none of which is illegal in and of itself. Nor does the mere characterization by petitioners of these transactions as being parts of an alleged scheme in violation of the antitrust laws make them illegal.

The petitioners tell us here that their principal allegation concerns certain alleged tying agreements (Pet., p. 4). As to this contention, insofar as unlawful detainer is concerned, the Eighth Circuit found that there is ". . . no evidence that the eviction proceeding is based upon plaintiff's refusal to continue to buy according to any tie-in agreement." (App. A, p. A6).

The amounts due for the management service fee and advertising fees are severable from the License Agreement because the respondents seek amounts which are already due and payable and not amounts to become due in the future. We submit that there is no difference between a claim for a past due account for goods sold and delivered, as in *Kelly* (and here), and a claim for past due account for management and advertising services already rendered.

In short, there is simply nothing in the evidence to support petitioners' contention that the purpose of the unlawful detainer proceeding is to oust Helfenbein from the restaurant ". . . because of his express inability and unwillingness to abide by International's tying agreements." (Pet., p. 13). In fact there is an express finding to the contrary.

Because the antitrust laws provide their own sanctions to deter conduct alleged to be in restraint of trade, we submit that the rationale of *Kelly* clearly means that the illegality defense now asserted by petitioners is not essential to the promotion of competition and should not be permitted except under the very narrow ground where the precise conduct rendered unlawful by the act would be enforced. In short, we submit that the Eighth Circuit did not fail properly to apply the *Kelly* doctrine.

The *Kelly* doctrine was presaged by this Court's decision in *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947). There the question was whether renewal notes representing the purchase price of cans sold were uncollectible if it was found that the vendor had violated the Robinson-Patman Act. As to each note, the plaintiff, a canner, pleaded "the consideration for said notes is illegal and said notes void and of no force and effect," because plaintiff sold to others at prices which discriminated against the purchaser. This Court, for purposes of its decisional analysis only in *Bruce's Juices*, assumed that the defense was established. The "sole question we decide is whether notes given for purchase are unenforceable if the quantity discount violates the Act." In refusing to allow the defense, this Court stated:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. . . . Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. . . . This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress." (l.c. 750).

The same sort of attempt to link intelligibly distinct economic transactions with contracts alleged to be in violation of the antitrust laws, as petitioners do here, was before the Court of Appeals in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F.2d 29 (7th Cir. 1959). That was a declaratory judgment action brought by certain Culligan dealers to require Culligan to recognize the validity of its dealership franchise agreements entered into with various plaintiffs. Culligan sought to cancel its franchise agreements and to substitute new agreements on

the grounds that (1) the agreements were in violation of Section 3 of the Clayton Act, and (2) the illegal provisions invalidated the entire contract. In rejecting these contentions, quite similar to those advanced by petitioners here, the Court of Appeals stated:

> "We interpret the current view of the Supreme Court to be that a defense based on violation of Section 3 of the Clayton Act is valid if the contract at issue is intrinsically illegal; that is—if the Court, by its judgment, would be enforcing the specific conduct prohibited by the Act. But such is not the case in the franchise agreements we are considering in the case at bar. We note again that all exclusive dealing contracts are not violative of Section 3 of the Clayton Act. Furthermore, plaintiffs are not asking the Court to enforce the exclusive dealing provisions of the agreements. As stated in Kelly v. Kosuga . . . the contract need not be condemned '* * * though it furnished the occasion for a restrictive agreement of the sort here in question.'" (l.c. 34).

Petitioners have advanced a series of additional arguments in an attempt to avoid the *Kelly* doctrine. First, petitioners claim that they were "overcharged for such goods and services." (Pet., p. 6). From this petitioners argue their inability to operate the restaurant profitably, and pay International (Pet., p. 7). This is later expanded into a claim (rejected by the Eighth Circuit) that such nonpayment occurred because of "the overcharges arising out of the illegal tying arrangements." (Pet., p. 21). Finally, petitioners claim their ability to litigate this matter will be hindered in the event unlawful detainer is allowed to proceed in the Missouri courts (Pet., p. 22).

These contentions are quite similar to those raised in *Orville Shoaf* v. *Triangle Publications, Inc.*, 1967 *Trade Cases*, ¶72,251 (E.D.Pa. 1967), where the plaintiff alleged violations of Sections 1 and 2 of the Sherman Act. De-

fendant counterclaimed and moved for summary judgment on his counterclaim which alleged that plaintiff owed defendant $3,142.57 on open account for newspapers sold and delivered. Plaintiff defended his nonpayment on the ground that the debt incurred was the result of defendant's resale price maintenance policy which established such excessive prices that the defendant was unable to pay the bills. In rejecting this contention, the Court stated:

> "*Kelly* controls the outcome of the case at bar. Plaintiff purchased the defendant's newspapers at the price charged all other dealers of his class. Even if, as the plaintiff alleges, the contract for the purchase of papers furnished the occasion for restrictive resale practices of the defendant, this court under the *Kelly* doctrine must enforce the contract since it is a completely separate claim for money owing on goods purchased . . . ."

B.

Petitioners Have Made No Showing of Any Conflict with Decisions of This Court or Any Courts of Appeals.

The final argument advanced by petitioners to avoid the import of the *Kelly* doctrine is that appearing on pages 21 and 22 of their brief. There petitioners suggest that the decision of the Eighth Circuit is in conflict with a series of cases (not discussed by petitioners in any way) but merely collectively cited under subdivision (a) [(Pet., p. 22)], which hold, so petitioners tell us, ". . . that the use of otherwise legal site control provisions in contracts is an illegal means of effecting anticompetitive results." We submit that none of these cases is pertinent to the case at bar and none of them shows that the various items of indebtedness are in any way tied up with the various antitrust claims advanced by petitioners.

Petitioners do not tell us in what way the cases cited on page 22 are in conflict with the Eighth Circuit's decision. We are left completely to speculation to determine any supposed conflict. Petitioners themselves suggest one distinction in that, in each of the cases, liability had been established and the issue was damages and not the propriety of the issuance of a temporary injunction. Although petitioners have not discussed any of these cases, to demonstrate the insubstantiality of petitioners' argument, we will discuss each *seriatim*.

The first case cited is *Federal Trade Commission* v. *Texaco, Inc.*, 393 U.S. 223 (1968). That case presumably is cited for the proposition that what petitioners term, "legal site control", becomes illegal when it is a "means of effecting anticompetitive results." The *Texaco* case was one of the continuing line of TBA cases which delineated practices peculiar to the petroleum distribution industry. The case was not one between private parties under Section 3 of the Clayton Act or Section 1 of the Sherman Act but was maintained by the Federal Trade Commission under Section 5 of the Trade Commission Act. An obvious distinction between this case and *Texaco* is the focus of this Court in *Texaco* upon Texaco's "dominant economic power." Thus, the Court stated:

> "It is against the background of this dominant economic power over the dealers that the sales-commission arrangement must be viewed." (l.c. 227).

There is no evidence in our case that the unlawful detainer action to recover the restaurant premises is the type of pressure tactic dealt with in *Texaco* to enforce illegal conduct. We deal here with a situation where the petitioners admittedly are substantially in arrears in the payment of monies owed which entitles respondents to pursue the remedy (i.e., unlawful detainer) available to regain possession of their premises.

In *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), plaintiff had asserted that he had been coerced into a lease of the retail outlet conditioned upon his acceptance of defendant's unlawful resale price maintenance policy carried out through a so-called "consignment" agreement. It was alleged that the lease itself was used as the vehicle ". . . . to police the retail prices charged by the consignees, renewals not being made if the conditions prescribed by the company are not met." (l.c. 14-15). Quite opposite to the finding of the Eighth Circuit in the present case that the eviction proceeding is not based upon petitioners' refusal to abide by the alleged tie-in arrangement was the express finding in *Simpson* that:

> "Solely because Simpson sold gasoline below the fixed price, Union Oil refused to renew the lease . . . ." (l.c. 15).

Thus this Court indicated that the lease and consignment arrangement violated the antitrust laws because these two agreements were used coercively to impose noncompetitive prices. There is no finding, nor evidence, in the present case that eviction is premised upon anything other than nonpayment of various items of indebtedness admittedly owed by petitioners to respondents. Nor is there any finding here that the eviction is being used coercively to enforce any program in violation of the antitrust laws or in retaliation for petitioners' refusal to abide by any program in violation of the antitrust laws.

Petitioners next cite *Sahm* v. *V-1 Oil Company*, 402 F.2d 69 (10th Cir. 1968), which is similarly inapposite. *Sahm*, like *Simpson*, involved a lease of a retail gasoline service station coupled with an oral agreement providing for consignment of gasoline to be retailed at prices set by the defendant. When plaintiff raised his price above that set by the defendant, defendant, through its sales man-

ager, protested the price increase and threatened cancellation of the lease. Later, plaintiff was advised by defendant's sales manager that termination of the lease could be prevented if plaintiff would abide by the resale price maintenance program. As in *Simpson*, the Court found that the resale price maintenance agreement was enforced by a related lease, the termination of which was used coercively to enforce the resale price maintenance agreement. As stated, there is and can be no similar finding in the present case.

The final case cited by petitioners under subdivision (a) is *Lessig* v. *Tidewater Oil Company*, 327 F.2d 459 (9th Cir. 1964). *Lessig* also involved certain practices of the gasoline distribution industry. Following a termination by Tidewater of its service station lease with Lessig, Lessig filed suit claiming violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, alleging that Tidewater had imposed unlawful tying arrangements. There was ample evidence not only of the existence of tying arrangements, but also ample evidence of Tidewater's market dominance in the imposition of such arrangements. For example, Tidewater sold gasoline in 32 states and had 6.5% of the total gasoline sales in eight western states. The Court of Appeals, in reversing judgment for Tidewater, also found that there was evidence of resale price maintenance by Tidewater and that plaintiff had been terminated because of his failure to adhere to resale prices. The case was remanded because of the trial court's failure to instruct the jury that Lessig could offer evidence of lost profits in determining losses and damages for cancellation of the lease. Contrary to petitioners' contention here, the Court in *Lessig* concluded (and Lessig did not so contend) that the tying arrangements had not led to the cancellation of the lease. Rather

than support petitioners' position, as to the injunction, *Lessig* is authority for the proposition that damages (rather than a preliminary injunction) is an adequate remedy for cancellation of a dealership.

None of the cases cited by petitioners under their subsection (a) on page 22 of their petition casts doubt upon the validity either of *Kelly* or of *Bruce's Juices,* nor upon the applicability of those cases here. Again petitioners have not attempted to tell us in what way the four cases cited conflict with the holding of the Eighth Circuit in the present case. And in fact, an examination of those cases does not support any contrary conclusion. There is no finding in our case that termination by an unlawful detainer action of petitioners' possession of the restaurant premises is used either coercively or in retaliation for petitioners' refusal to abide by alleged tying arrangements. To the contrary, there is an express finding that there is ". . . no evidence that the eviction proceeding is based upon plaintiffs' refusal to continue to buy according to any tie-in agreement." (App. A, p. A6).

Earlier in their petition (Pet., p. 16), petitioners cited an additional Court of Appeals case, presumably arguing that the Eighth Circuit's decision is in conflict with it. That is *Bergen Drug Company* v. *Parke, Davis & Company,* 307 F.2d 725 (3d Cir. 1962). That case has been cited by petitioners in support of Helfenbein's claim ". . . that his efforts to prosecute anti-trust damages would be intentionally frustrated if International would be permitted to pursue its eviction action in state court . . . ." (Pet., p. 16). In that action a wholesaler commenced an antitrust action against Parke, Davis for treble damages and a permanent injunction and filed a motion for an injunction pendente lite requesting that defendant be enjoined from cancelling plaintiff and from refusing to fill its orders and to

continue to sell as before. The District Court held that there was no statutory basis for the injunction and denied the motion. The Court of Appeals held that the District Court, under its general equity powers, could have granted such an injunction and relied upon *Bateman* v. *Ford Motor Company*, 302 F.2d 63 (3d Cir. 1962), in support. (This is also a case upon which petitioners rely on page 4.)

Contrary to the present case, *Bergen* was not brought under Section 16 of the Clayton Act, but rather under the general equity powers of the Court. The *Bateman* case cited by the Court in *Bergen* was a Dealer's Day in Court Act case wherein, in order to show that an injunction should issue, all that was needed to be shown was that a substantial dispute existed as to whether the dealer was cancelled in good faith. Where the very issue to be litigated in such cases is the good faith of the manufacturer in cancelling the dealer, a much lesser standard can be applied with respect to whether the dealer should be kept in possession of his store pending trial on the good faith cancellation issue. In *Bergen*, Parke, Davis had conceded that it had terminated plaintiff out of resentment and because of his filing of the antitrust action. There is no such finding in our case. A similar finding was made in *Bergen* where the Court found:

> "The undisputed facts here are that the buyer-seller relationship was discontinued because of the filing of the main action." (l.c. 727).

But in our case there is no evidence of any kind that International seeks to bring unlawful detainer for any reason other than to regain possession of the premises because of nonpayment for goods sold and delivered, services rendered, equipment rented and past due principal and interest on a promissory note. Also quite contrary to our case is the finding in *Bergen* that defendant had failed to claim

that a preliminary injunction would be oppressive. The contrary has been the claim of International in this case.

Petitioners then cite, again without any discussion, three cases under their subparagraph (b) on page 22. Apparently these cases are cited for the proposition that ". . . it is normally sufficient to prove that the defendant materially contributed to plaintiff's injury . . . ." (Pet., p. 22). We have been unable to ascertain in what way the proposition for which these cases are cited relates to the present case. We have read these three cases, and none seems relevant. We are not aware of any standard of causation that is in issue in this case that is discussed in these three cases. We have not been enlightened by petitioners as to the relevance of these cases to the present one. We do not believe that we are required to speculate or to attempt to construct arguments for the petitioners from which they themselves defer.

Finally, petitioners have cited three cases (Pet., p 13), apparently in support of petitioners' desire to have a "clarification" of this Court's decisions in *Bruce's Juices* and *Kelly*. Petitioners' argument in this respect is premised upon petitioners' contention that eviction is sought here ". . . because of [Helfenbein's] express inability and unwillingness to abide by International's tying agreements." (Pet., p. 13). The evidence in this case, as we have said before, is that there is no retaliatory or coercive motive involved in the action by International in seeking to evict Helfenbein from the restaurant. The Court of Appeals expressly has found to the contrary and has found that there is no relationship between any alleged tying agreement and the unlawful detainer action. Undisputed by petitioners is the fact of their substantial indebtedness arising in five categories.

The findings in our case starkly contrast with those in each of the three cases cited by petitioners on page 13.

In *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), there was an express finding that the notice to quit was given to plaintiff "in retaliation for her complaints to the housing authorities" of violations of the District of Columbia building codes (l.c. 688-689).

In *Javins* v. *First National Realty Corporation*, 428 F.2d 1071 (D.C. Cir. 1970), plaintiffs offered to prove the existence of approximately 1,500 violations of the Housing Regulations of the District of Columbia. The Court held that the tenant's obligation was dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. Thus the Court stated:

> "In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty." (l.c. 1082).

In *Schweiger* v. *Superior Court of Alameda County*, 90 Cal. Rptr. 729, 476 P.2d 97 (Cal. 1970), there was a finding that the landlord's rent increase and eviction action had been intended as retaliation against the petitioner for asserting his statutory rights. As delineated by the California court, the case involved the resolution of an apparent conflict between certain sections of the California code dealing with rights of landlords and tenants.

Even a brief recitation of the facts and holdings of these three cases demonstrates their inapplicability to this case where petitioners, contrary to the holdings of this Court in *Kelly* and *Bruce's Juices*, are attempting to assert violations of the Federal Antitrust Laws as a defense to an action based upon nonpayment of items of indebtedness admittedly owed.

CONCLUSION

We submit that the Court of Appeals and District Court correctly decided this case upon the basis of this Court's decisions in *Kelly* and *Bruce's Juices*. We submit that this decision is not in conflict with any of the decisions of this Court or with those of the Courts of Appeal in the various cases cited in petitioners' brief. We do not believe that the petitioners have established the existence of any of the considerations delineated under Rule 19 of this Court for the granting of a writ of certiorari. We, therefore, respectfully request that this Court deny petitioners' petition for a writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-233

ROBERT J. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC.,
Petitioners,

VS.

INTERNATIONAL INDUSTRIES, INC., ET AL.,
Respondents.

SUPPLEMENTAL AND REPLY BRIEFS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

"The Economic Effects of Franchising", a Monograph Recently Published by the Graduate School of Business at the University of Wisconsin under Commission from the Small Business Administration, Should Be Considered by the Court in Reviewing the Petition Herein for the Sole Purpose of Determining the Importance of the Issues Presented to the Court.

In late July or early August, 1971, the Graduate School of Business at the University of Wisconsin, under commission from the Small Business Administration, published a monograph entitled "The Economic Effects of Franchis-

ing." This monograph, which was authored by Urban B. Ozanne, D.B.A., and Shelby D. Hunt, Ph.D., both of whom are Assistant Professors of Business at the University of Wisconsin, is the summary of a survey undertaken of numerous franchisors and franchisees primarily in "fast-food" oriented operations, and will be referred to in petitioners' briefs as "the SBA Survey." A copy of the SBA Survey is being filed as "Exhibit 30" in this matter.

International has objected to the interjection of new exhibits at this juncture of the proceedings, and Helfenbein has replied to these objections in his reply brief herein incorporated. With respect specifically to the SBA Survey, it would be prejudicial not only to Helfenbein, but to franchisees in general, to foreclose its consideration by the Court in determining whether the issues in the action now before the Court are of sufficient importance to deserve the issuance of a writ of certiorari. This is, to counsel's knowledge, the first comprehensive study of the effects of franchising on the economy by impartial and competent observers, and much information is revealed that was only speculation previously.[1]

1. The SBA Survey, at pages 1-8 and 1-9, mentions four "major empirical studies on franchising, and several unpublished theses on franchising, but all are understood to be rather limited in scope in comparison with the SBA Survey, especially with respect to fast food operations.

II

The Issues Are Important to the Entire Fast Food Franchising Industry Because Many Franchisees Are Required to Purchase a Substantial Portion of Their Merchandise and Supplies from Their Franchisor or a Supplier Approved by Their Franchisor, Because Such Franchisees Have Substantially Lower Incomes Than Franchisees Who Do Not Have Such Purchasing Restrictions, and Because Numerous Franchisees Have Experienced Substantial Financial Losses, Including the Loss of Their Franchised Businesses, As a Consequence of Such Purchasing Restrictions. A Resolution of the Issues Raised by Helfenbein's Petition in Favor of Helfenbein Will Aid the Numerous Other Franchisees Who Are Suffering Losses and Who Are under Threat of Loss of Their Franchised Businesses for Reasons Attributable to Any Substantial Extent to Illegal Tying Agreements to More Readily Obtain Relief Through the Courts.

With regard to purchasing requirements imposed by franchisors on their franchisees, the authors of the SBA Survey state (at p. 5-21):

> A very common practice is to require franchisees to purchase operating supplies such as paper goods, foodstuffs, spices, and soft drink syrup from the franchisor. About 70% of all franchisees are required to purchase at least some of their operating supplies from the franchisor. Of those franchisees who must purchase from their franchisors, the median percentage of total operating supplies that they purchase from their franchisor is 50%. This means that 35% of the franchisees must buy less than 50% of their requirements from their franchisors, and 35% of the franchisees must buy more than 50% of their requirements from their franchisors. The remaining 30% are not required to purchase operating supplies from their franchisors. Sales of operating supplies to the franchisee represent a large source of revenue for many franchisors.

And they further stated (at p. 5-23):

> Frequently, franchisees must purchase supplies from either the franchisor *or an approved vendor.* Sixty percent of the franchisors indicated that they reserved the right to approve the franchisee's major suppliers.

The responding franchisors gave two primary justifications for requiring franchisees to buy from them: (1) savings arise to the franchisor from volume purchasing, and (2), quality control. (SBA Survey, p. 5-21). However, it is doubtful that franchisees are deriving much benefit from such restrictions. The authors of the SBA Survey state (p. 5-21):

> * * * Most franchisees do not believe that they are getting lower prices because of their franchisors' volume purchasing. Table 5-9 indicates that 47% of the franchisees who must buy from their franchisors believe that they are paying higher prices than they could obtain on their own. Only 25% believe that they are paying lower prices than they could obtain elsewhere.

And at p. 5-23 the authors state:

> * * * Franchisees who are required to buy a high percentage of their total supplies from their franchisors have significantly lower income from their units than do franchisees who are required to purchase a low percentage of their total supplies (table 5-11, test 16). The evidence suggests that having to purchase supplies from the franchisors materially reduces the franchisee's income.

This latter statement supports Helfenbein's experience in that he was able to materially reduce his food costs as a percentage of gross sales when he renounced the tying restrictions and started buying food and supplies in a competitive market.

There are no rebates involved with respect to purchases by IHOP franchisees because substantially all

sales to them are by International, even though delivery may be made by an "approved supplier." (Ex. 5; Ex. 6, p. 49). In this way, International is able to make a profit by taking a discount upon payment to the supplier. (Exs. 7-11). 41% of the franchisees responding to the SBA Survey indicated that, to the best of their knowledge, their franchisor was receiving a "commission" from some of their suppliers. (pp. 5-23, 24). In this respect, the authors of the SBA Survey stated (p. 5-24):

> The economic consequences of the prevalence of "kickbacks" is dramatically revealed when the presence of "kickbacks" is associated with franchisee income. The franchisees who believed their franchisors were taking "kickbacks" had significantly *lower* incomes than other franchisees (Table 5-11, test 17).

In a section of the SBA Survey entitled "Franchisees' Evaluation of Franchising" (starting at p. 5-28), the authors introduced their remarks with the following statement: "Many franchisees were bitter about their franchised businesses and took advantage of the franchisee questionnaire to air their greivances (sic)." There followed several examples of comments received from franchisees. Starting at page 5-29, the authors state:

> The financial consequences of a bad franchise can be devastating. The following comments come from an ice cream franchisee who bought his franchise in 1965 and was forced to purchase 75% of his supplies and merchandise from the franchisor at what he felt to be higher prices than he could purchase equivalent supplies elsewhere:
>
> > On May 8 of this year we finally sold our business, and the whole experience was a nightmare.
> >
> > The first six months we lost $4,000. Because we had put so much money in this venture we thought we could not abandon this and slowly and methodically

during this period, we sold our $25,000 home, all our stocks and bonds, and then borrowed money to keep it going.

We set the deadline at August 1970 to file for bankruptcy if we could not sell before that date—we had been trying to sell since 1966 to no avail.

We were fortunate to sell for $12,000 which just covered all the money that we owed. We have depleted all our savings, our home and we are left with no assets at all. When we signed our franchise agreement our net worth was $39,500.

The complete despair of a franchisee who is "locked" into what she believes to be an inequitable contract and must buy 90% of her supplies from her franchisor is graphically described by a lady who signed herself as "Hopeless":

The . . . National Bank president looked at our contract with [name of franchise system] as we would like out. He never saw a contract so one sided; it would be hopeless to find a buyer and it [would] cost too much to buy them out so we have to keep going or walk out. How long can we last! I wish someone would look into this operation—a lawyer is not the answer because they are not sure either—but we are trapped.

Of direct concern to the economy of the country is the failure rate of businesses within it. Determining the failure rate of small businesses in general, or of a named industry in particular, is exceedingly difficult because there are many businesses that are sold that could possibly have been called "failures." Business turnovers is a statistic more readily ascertainable. For purposes of the SBA survey, a "turnover" was a transaction in which ownership of a franchised outlet changed or in which the outlet was discontinued. (SBA Survey, p. 3-25).

At pages 14 and 15 of petitioners' brief, turnover among IHOP franchisees was discussed. The statistics were all derived from Exhibit 26, various documents which were a matter of record in the courts below.

The SBA Survey dwells further on the failure rate and turnover rate among franchisees. Certain of the conclusions and findings of the authors will here be discussed.

Franchisee turnover was 7.1% in 1968 and 6.7% in 1969. (SBA Survey, p. 3-26). A calculation of the actual failure rate of franchisees was considered by the authors to be impossible. However, they concluded that the failure rate ranged between 1.3% and 7.1% in 1968 and between 1.3% and 6.7% in 1969, and opined that this estimate was probably too low because of the greater inclination of "ethical" franchisors to answer than "unethical franchisors" and because franchise systems that had failed could not answer. (SBA Survey, pp. 3-27 and 3-28).

The authors made several comments regarding "Franchising: The Odds-on Favorite," a book written by J. F. Atkinson and published by the International Franchise Association (an association of franchisors) in 1968. This book contains a number of statistics regarding franchisee failure rates based upon franchisor furnished information. Comparison was made in Atkinson's book between the failure rate for franchisees and the failure rate represented to be that of all business firms. The SBA Survey concluded that Atkinson's book "makes erroneous comparisons with overall retail trade failure rates, which would be completely misleading when read by potential franchisors (sic)." (SBA Survey, pp. 3-29 and 3-30). In fact, the authors stated (p. 3-29): "Actually, the Atkinson study—if it shows anything—shows that franchised units fail 'faster' than retail trade as a whole * * *." The authors

of the SBA Survey, in their general recommendations, stated (at p. 2-37):

> 8. We recommend that the International Franchise Association withdraw from circulation all copies of the book *Franchising: The Odds-On Favorite*, by J. F. Atkinson. The book presents grossly inaccurate data on failure rates and would be very misleading to potential franchisees.

The franchisors have apparently been making general use of Atkinson's study to encourage potential franchisees to purchase franchises.

These comments are made regarding the Atkinson survey not as a critique of the survey, but to illustrate how potential franchisees have apparently been misled into believing they were purchasing a greater amount of security upon acquiring a franchised business than could be obtained by going into business on their own. It follows that these franchisees need not only the protection that hopefully will be afforded by the plethora of legislation affecting the franchise industry that has either been passed or proposed in recent years, but also pronouncements by this Court in matters such as Helfenbein's attempt to consolidate the multiple and vexatious litigation in which he is ensnarled into one Court competent to hear all issues so that he can be adequately represented on all issues.

Helfenbein in no way intends these remarks to indict the entire franchise industry. The SBA Survey indicates that 65.4% of the responding franchisees "are sufficiently satisfied with their franchised businesses that 'if they had to do over again,' they would still choose to be franchisees with their present systems (Table 5-10)." (p. 5-32). The sampling of letters published however, and the fact the authors stated "Many franchisees were bitter" indicates that there are many franchisees, or former

franchisees, who have lost substantial sums of money in their franchised businesses. The letters published also indicate that such losses are often attributable to tying requirements imposed by the franchisors. This conclusion is further supported by the findings that franchisees who are required to purchase a substantial amount of their supplies from their franchisor had materially reduced income (p. 5-23), and that franchisees who believed their franchisors were receiving "kickbacks" from their suppliers had significantly lower incomes than other franchisees. (p. 5-24).

The courts so far have not provided an answer. To have very liberal laws in favor of antitrust claimants is one thing. To be able to take advantage of these laws is something else. At page 8-5 of the SBA Survey, the response of one franchisee summarized the problem quite succinctly:

> [Name of system] blatantly uses fraudulent sales pitches and figures to sell their franchises. Right now I am in a position of losing my entire investment because they sold me a bill of goods. The cost of lawsuits is a burden (I have spent in excess of $7,500.00) and seems to be of no avail, because they are so big and have so much money they can wait until you simply can't afford to fight anymore and then settle for very little. I am faced at this point with little choice but to find a job and abandon my fight, although I have made many gains for franchise holders in [franchisee's geographical area].

III

Within the Fast Food Franchising Industry There Is a Great Imbalance of Power Favoring the Franchisors Over Their Franchisees. This Imbalance of Power Is Being Used to Force Franchisees Who May Object to Illegal Franchisor Practices to Expose Their Franchises to Termination at Substantial Financial Loss to the Franchisee Owners. A Favorable Determination of the Issues Will Help Neutralize the Use of This Imbalance of Power to Achieve Illegal Franchisor Objectives.

The threat and inception of eviction proceedings against Helfenbein by International is the continuation of an imbalance of power relationship that exists in the fast food franchise industry between franchisor and franchisee. With respect to this imbalance of power, the authors of the SBA Survey state (pp. 2-26, 2-27):

> Some franchisors keep the contents of their agreements inviolate and non-negotiable and are unwilling to have it examined before the prospective franchisee has paid a nonreturnable deposit toward purchase. This attitude sets the tone of a relationship between franchisor and franchisee that is noteworthy for the power imbalance in favor of the franchisor. The power imbalance is apparent during contract negotiations and extends over the term of the relationship. Not only is the franchisee economically inferior to the franchisor, but he suffers from an information inferiority because the franchisor understands the implications of the agreement he has devised, has experience in negotiating, and provides the bulk of the information about the franchise.
>
> The imbalance between franchisor and franchisee extends to the franchise agreement itself. The typical franchise agreement imposes far more obligations on the franchisee than on the franchisor. Moreover, the franchisee obligations are specified more closely and in greater detail, while the franchisor obligations

tend to be vague and are hedged in limiting phrases. Results from the franchisor questionnaire suggest that most franchisors do enforce the many franchisee obligations (see Table 8-1), and, even if the franchisors did not enforce all franchisee obligations, the clauses are there as a threat and could be used to eliminate unruly franchisees.

Helfenbein's License Agreement (Ex. 1-B) is an ideal example of the one-sided type of License Agreement of which the authors of the SBA Survey speak. There are many specific obligations on Helfenbein, and comparatively few obligations of a vague nature on International.

The power imbalance is exemplified especially by the provisions concerning arbitration, termination of license, etc. There is a very broad arbitration clause, Article XIH. This, in and of itself, is recommendable. But arbitration is required in Los Angeles, California. International's headquarters. How can a franchisee distantly removed from Los Angeles, California possibly be represented adequately if he must arbitrate in that city? This is a distinct advantage to International.

The advantage does not stop there. In a proviso to the arbitration clause, International reserves the right "to apply to any court of competent jurisdiction for appropriate writs for recovery of possession of the premises" without first seeking arbitration. Helfenbein has certain financial obligations to International that are required by Paragraph A, Article IV, of his License Agreement to be satisfied. These include payment of equipment rent, management and advertising fees, etc. Article VIII of the License Agreement provides for termination of the license in the event of breach of its terms. And Article II of the premises sublease (Ex. 1-F) provides for termination of the sublease at the option of International in the event the License Agreement is terminated. International has followed the

foregoing course in seeking to evict Helfenbein. (Exs. 1-K, 1-M).

The power of franchise termination (and resulting eviction from the franchised premises) is the extreme manifestation of the power imbalance. In the SBA Survey, it was reported that only 118 (12.9%) of the 915 responding franchisees had ever been threatened with revocation of their franchise. The authors continued, "However, some franchisees may feel an implied threat of termination, because of the way most franchise agreements dwell on the franchisor's right to terminate." (p. 8-20). In answer to a question regarding the need for federal legislation to restrict franchise termination, 76.7% of the franchisees responded that such legislation was very necessary or necessary. In this regard, the authors commented: "Apparently, most franchisees feel insecure in their franchise and desire greater protection from arbitrary cancellation." (p. 8-21).

Along the same line, the SBA Survey indicated (p. 8-7) "Relatively few franchisors reported that the requirements (of their contracts and operating manuals) were 'not strictly enforced' (Table 8-1). * * * However, if franchisors did not enforce all franchisee obligations, the clauses are there as a threat and could be used to eliminate unruly franchisees." (Parenthetical remarks supplied.)

And at page 8-19 of the SBA Survey the authors state, with respect to termination clauses: "Moreover, there is always the issue of unequal application, i.e., enforcing a particular clause to get rid of a recalcitrant franchisee when the same defaulting behavior is ignored in other franchisees."

It is this very discrimination that Helfenbein claims is being practiced against him by International. It is one thing for the courts to merely enforce the sanctity of

contracts, and quite another to enforce the sanctity of a harsh termination clause in a contract of adhesion in a manner that is likely to discourage other franchisees from challenging in any way the legality of their license agreements or of the practices of their franchisor. Helfenbein's purpose in seeking the preliminary injunction against a separate eviction proceeding is an attempt to neutralize the one-sided provisions in his license agreement and related contracts. If the preliminary injunction is granted, International will have to choose between filing in the U.S. District Court wherein the antitrust action is filed a counter-claim seeking possession of the premises, or in awaiting the outcome of the antitrust action before filing for eviction in state court. In this way all of the antitrust issues can be consolidated in one tribunal. In no way does the preliminary injunction permit Helfenbein to avoid paying for something he has purported to purchase!

Helfenbein claims that his position is so common to that of other franchisees, especially to the large number in the fast-food industry, that the issues deserve the attention of this Court.

IV

Although the Franchise Industry Legislation Referred to in Helfenbein's Petition Was Not Acted Upon by Congress, There Is Still a Demand for Congressional Action Regulating This Industry, Especially with Respect to Franchise Terminations, As Evidenced by Bills Recently Proposed in the Senate.

Certain franchise industry oriented legislative bills were referred to in Helfenbein's petition for writ of certiorari, but none of these bills were voted upon prior to the time Congress closed. The need is still there for such legislation, as evidenced by the proposal by the Honorable Harrison A. Williams, Jr., U. S. Senator from New Jersey, on August 2, 1971, of the Franchise Fair Practices Act, S.

2399, 92nd Congress, 1st Session.[2] This bill is described as follows (117 Cong. Rec. S. 12775 [daily ed. Aug. 2, 1971]):

> S. 2399. A bill to require under the supervision of the Federal Trade Commission a full and a fair disclosure of the nature of interests in business franchises, to provide increased protection in the public interest for franchises in the sale of business franchises and to provide for fair competitive practices in the operation of franchise businesses and the termination of franchise agreements.

And on August 6, 1971, the Honorable Philip A. Hart, United States Senator from the State of Michigan, introduced the "Fairness in Franchising Act," S. 2472, 92nd Congress, 1st Session[3], "A bill to supplement the antitrust laws of the United States by providing for fair competitive practices in the termination of franchise agreements." 117 Cong. Rec. S. 13501 (Daily ed. Aug. 6, 1971). Senator Hart introduced S. 2472 with the following remarks (117 Cong. Rec. S. 13501 (Daily ed. Aug. 6, 1971)):

> FAIRNESS IN FRANCHISING ACT
>
> Mr. HART. Mr. President, $1 out of every $4 a consumer spends for goods these days goes into the pocket of a franchised business.
>
> This includes purchases ranging from gasoline to chicken, from automobiles to temporary office help.
>
> All told, consumers spend more than $100 billion each year with franchised operations.
>
> Obviously, franchising is a significant segment of our economy. Yet, because it really blossomed only in recent years and because it often has been more the

2. As of the date this supplemental brief is being written, petitioners do not have a copy of the Franchise Fair Practices Act.

3. The Fairness in Franchising Act has been reprinted in Appendix D, pp. A1-A5.

subject of advertising puffery than of exacting scrutiny, few safeguards have been built into the system.

Let us face it, franchising was a distribution system developed for the benefit of entrepreneurs. It grew not from the grassroots up but from the central seats of power down.

Therefore, it should not be surprising that much in the system is feudal in concept. A glance at most of the more than 700 different franchise agreements floating around in this country will substantiate that.

"The franchisee shall" is the most common phrase throughout the contracts. And, unfortunately, it often is only after that "said franchisee" has been in business a while that it begins to dawn on him that the onus to perform is chiefly on him.

Franchisees are controlled by contract to such extents as source of supplies, hours of operation, cleaning techniques, number of employees, selection of vending machines, territories of operation, and sometimes even prices to be charged.

For this "independence," the franchisee is allowed to put up the capital and frequently to work hours far in excess of those any employee would legally be allowed.

As one franchise agreement spelled it out:

In no event shall the franchisor ever be liable to franchisees for any claims of whatever nature.

The franchisee is kept in line with a very powerful weapon:

Cancellation—or the threat of cancellation.

Faced with the loss of his investment—or both money and time—plus the ignominy of failure, franchisees "go along in order to get along."

But, under the law as it stands today even "going along" and doing a very good job for the franchisor

at the same time is no protection against losing the business.

Termination—or refusal to renew—is commonplace in franchising.

* * *

We emphasize the legislative activity in Congress with regard to proposed franchise industry legislation because it points up the crying need of franchisees for help in defending themselves from wrongful termination of their franchises. And when we speak of "wrongful terminations," we include terminations arising out of franchisees' inability to meet financial obligations to franchisors because of losses suffered as a result of burdensome illegal tying agreements imposed by the franchisors, and we speak of the selective termination of recalcitrant franchisees in an attempt to force prompt and favorable settlement of antitrust suits so that they can be classified merely as nuisance type litigation, to eliminate non-conformist franchisees who renounce the illegal tying agreements, and to keep the other franchisees in line. Helfenbein falls in each of these categories. And although legislation in the area is certainly desirable, it is not the only answer, and the Courts are shirking their responsibility if they pass the buck to the legislators. There is no reason why the Courts cannot tell a franchisor in appropriate cases, and we submit that Helfenbein's is appropriate, that if they desire to rid themselves by means of an unlawful detainer action of a franchisee who is also an antitrust claimant against the franchisor, that the franchisor will not be able to harass that franchisee by involving him in multiple lawsuits. The franchisor will be permitted to promptly file and prosecute his unlawful detainer action as a counter-claim in the antitrust suit, or if the franchisor chooses, it can await the outcome of that suit, and absent a decree to the contrary in the antitrust action, file and prosecute its unlawful detainer action in the state courts. The appropriate circumstances for such an injunction are discussed at pp. 19-20 in petitioner's reply brief.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Decisions of This Court in Kelly v. Kosuga, Infra, and Bruce's Juices v. American Can Co., Infra, Are Not Applicable to the Facts in the Case on Review Because:

(A) Helfenbein Seeks to Enjoin International from Bringing a Separate Eviction Action in State Court to Avoid a Multiplicity of Litigation That Will Seriously Impair His Ability to Prosecute an Antitrust Action Against International, Not to Get International's Property for Nothing When He Purported to Be Buying It. The Injunction Is Not Sought to Prevent a Counter-Claim in the Antitrust Action Seeking Eviction of Helfenbein from His Franchised Premises.

(B) The Decisions in Both Kelly v. Kosuga and Bruce's Juices v. American Can Co. Apply Only to Charges for Fully Executed Portions of Contracts. International's Charges for Advertising and Management Services Subsequent to Helfenbein's Renunciation of Such Services on February 5, 1968 Are Based Solely upon the License Agreement Between the Parties and Are Not for Services in Fact Performed According to Such License Agreement. They Are Therefore Severable from Charges for Goods and Services Purportedly Furnished.

(C) Contrary to the Factual Situations in Kelly v. Kosuga and Bruce's Juices v. American Can Co., the Case on Review Involves a Continuing Illegal Activity That Is Nurtured by International's Ability to Involve Helfenbein in Litigation in a Separate Forum.

International makes much to do about the application of *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), and *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947), to the facts

in the case presently on review. The issue is not whether Helfenbein is trying to use Section 16 of the Clayton Act, 15 U.S.C., Sec. 26, to get something for nothing, as International tries to persuade the Court. Helfenbein merely wants to place all the issues before one court competent to hear all the issues; namely, the United States District Court for the Western District of Missouri. International insists upon litigating the eviction issue in the courts of the State of Missouri. Their counsel stated at the hearing on Helfenbein's request for preliminary injunction "We are asking this Court only to allow the parties to litigate *in the forum provided therefor* such disputes which they may have which do not touch upon the matters before this Court." (Tr. 33, A. 71). (Emphasis supplied.)

Helfenbein has no complaint against the courts of the State of Missouri. His complaint is against multiple litigation of inter-related issues. As stated at page 18 of his initial petition to this Court, he has certain equitable defenses to the eviction which require proof substantially identical to the proof that will be required in his antitrust case. These equitable defenses arise under Missouri law, not under the Federal antitrust law. In *Kelly* v. *Kosuga*, supra, l.c. 358 U.S. 519, this Court held that "state law governs the rights and duties of sellers and purchasers of goods * * * ." We assume this Court would just as readily hold that state law should govern in general the rights and duties of landlords and tenants.

In arguing the applicability of this Court's decisions in both *Kelly*, supra, and *Bruce's Juices*, supra, International has relied upon the premise that all of the goods and services with respect to which Helfenbein has been charged and which must be paid in order to avoid eviction have in fact been performed. (Resp. p. 11, 12, 15, 16). But the undisputed fact is that subsequent to February 5, 1968, no adver-

tising or management services were furnished by International to Helfenbein. Of the $75,000 claimed due for goods and services, about $30,000 represents charges for unperformed advertising and management services arising solely out of claimed post-February 5, 1968 contractual obligations which obligations had been renounced. (Ex. 1, p. 4; A. 68-70).[4] These are the charges Helfenbein claims to be severable, and as to which this Court's decisions in *Kelly,* supra, and *Bruce's Juices,* supra, have no bearing. These charges are, in fact, severable, and International may not obtain judgment for them. *Associated Press* v. *Taft-Ingalls Corp.,* 340 F.2d 753, (6th Cir.), cert. den. 382 U.S. 820.

This Court's decisions in both *Kelly,* supra, and *Bruce's Juices,* supra, are not applicable for yet another reason. In both of those cases the activities or transactions that were purportedly illegal under the Federal antitrust laws had ceased. In the case at bar, the illegal activity continues, and is nurtured by the tortfeasor's ability to involve its franchisees in multiple and vexatious litigation.

A franchisee has enough problems merely prosecuting an antitrust suit against a much larger and much more powerful franchisor. Must he also bear the expense, burden and worry of defending a completely separate eviction action in a separate court at the same time? The injunction against a *separate* eviction action should be issued if the claimant can satisfy the court in the following respects: (1) that the litigation to be enjoined will in and of itself be an aid to the antitrust defendant in imposing its requirements allegedly in violation of the antitrust laws on the claimant and/or other parties; (2) that there is substantial likelihood that the allegations of the antitrust

4. A more comprehensive discussion regarding the charges for renounced and unperformed services is contained in Helfenbein's Petition for Rehearing to the Eighth Circuit, pages 2-4.

claim will be sustained at trial on the merits, and that (a) the purportedly illegal conduct of the antitrust defendant caused the deficiencies alleged by the antitrust defendant as justification for the eviction action (i.e., delinquency in paying rent or other obligations to the antitrust defendant), or (b) the eviction action was brought in retaliation for the activities of the claimant in opposition to the purportedly illegal activities of the antitrust defendant (i.e., the filing of an antitrust action or the renunciation of tying requirements); and (3), that the separate prosecution of the eviction action in a court other than that in which the antitrust action has been filed will result in multiple litigation over identical issues (i.e. the activities of the antitrust defendant purportedly in violation of the antitrust laws) that will severely impair the ability of the antitrust claimant to prosecute his claim.

II

The Circumstantial Evidence Tending to Prove That International Was Motivated to Attempt Franchise Termination and Eviction by Helfenbein's Renunciation of the Tying Arrangement Was Not Considered by the Eighth Circuit. The Finding of the Eighth Circuit in This Regard Is Therefore Erroneous and Should Be Disregarded by This Court.

International's brief dwells on the finding of the Eighth Circuit that "There is no evidence that the eviction proceeding is based upon plaintiffs' refusal to continue to buy according to any tie-in agreement." (App. A, p. A6). Apparently, the Eighth Circuit would require franchisees to furnish direct evidence that a franchisor/landlord was using its control over the franchised premises to coerce franchisees into compliance with illegal restrictions. The existence of International's controls over Helfenbein's premises has not been contested by International.[5] The

5. For more discussion regarding these controls, please refer to pages 13-15 of respondents' brief to the Eighth Circuit and pages 5 and 6 of respondents' brief to this Court.

issue arises as to the reason International is attempting to exercise these controls against Helfenbein.

Helfenbein did not offer any direct evidence concerning International's reason for attempting to evict him. But to require evidence of this nature at a preliminary injunction hearing as a condition of issuing the injunction is to impose an unreasonable burden on a franchisee. This is especially true in the instant action, and the circumstantial evidence should be considered. The evidence proved beyond any doubt that International was soliciting and receiving rebates from suppliers to IHOP franchisees, including Helfenbein (Ex. 7-11), that International imposed tying restrictions on its IHOP franchisees with respect to substantially all food, supplies, equipment, and services required for the operation of their restaurants (Ex. 1, pp. 2-5; Ex. 1-B, p. 3; Ex. 1-D), that Helfenbein had renounced such restrictions on February 5, 1968 (Ex. 1, p. 4), that Helfenbein had suffered substantial losses beyond the financial delinquencies to International as a result of such restrictions prior to the renunciation and was able to effect substantial savings after the renunciation (Ex. 1, pp. 3-5; Ex. 2), that International very strictly enforced the requirements of its license agreements and operating manuals (Ex. 3, pp. 6-8), that the failure of an IHOP franchisee to abide by such requirements could result in termination of his franchise and eviction from his franchised restaurant without prior arbitration,[6] and that he could avoid the eviction proceeding only by paying International all that International claimed was due, including the contractual charges for management and advertising services that had been renounced and weren't even being provided.[7]

6. Supra, p. 11, petitioners' supplemental brief.

7. Mr. Gershon, counsel for International, stated at the hearing on the preliminary injunction:

The Eighth Circuit ignored all of the foregoing circumstantial evidence in arriving at its conclusion. International should not be permitted to capitalize on this error to the substantial prejudice of Helfenbein.

III

There Is an Abundance of Unrebutted Evidence Proving That Helfenbein Lost a Substantial Amount of Money As a Result of the Tying Arrangements Imposed on Him by International.

Respondents take issue with the existence and proof of losses suffered by Helfenbein as a consequence of the tying arrangement imposed upon him by International. In petitioners' brief only slight mention was made (at p. 6) of these losses, assuming at the time that, in view of the overwhelming evidence before the District Court, respondents would not have the audacity to deny them. The Court's attention is directed to the following:

(1) A "confidential" bulletin from Leon Gottlieb, National Licensing Director of International, directed to Area Licensors and Regional Directors, dated December 17, 1964, admitting that International has been receiving a "discount or rebate" from suppliers to its franchisees and requesting the Area Licensers and Regional.Directors to continue this practice. (Ex. 7). No attempt was made to rebut this evidence.

(2) A series of letters and other documents proving that International was receiving a "rebate" of almost 8 per cent on all dairy purchases by its IHOP franchisees in the Kansas City area through May 22, 1967 (soon after the time this scheme was discovered

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"* * * If in fact the plaintiff has a valuable investment, which he seeks to preserve, he has two remedies for it. The first is to pay what he owes, seek his remedies in this court and continue his operation, and we would be delighted to permit him to do so. * * *" (Tr. 33, A. 70).

by one of the franchisee victims). (Ex. 8-11). No attempt was made to rebut this evidence.

(3) The computations by Matthew T. Kearney, CPA, the accountant for Helfenbein, showing that Helfenbein after renouncing the illegal tying requirements, reduced his food costs in his Kansas City restaurant from 35.5% of food sales to 29.0%, and in Des Moines from 36.9% to 32.9%. Mr. Kearney, on the basis of this experience, then estimated that Helfenbein had lost $10,700 on food purchases alone prior to renouncing the illegal restrictions. However, on re-examination of his computations, it is obvious on their face that the loss should be closer to about $35,000. Mr. Kearney had erroneously applied the savings in food costs percentage against purchases instead of against sales. (Footnote (1), Ex. 2-A). This loss, it should be emphasized, was on food purchases only. It doesn't include the losses Helfenbein also suffered on purchases of supplies, etc. from International, nor does it include losses arising out of rental of equipment or from management and advertising service charges paid to International, all of which, out of necessity had to be estimated for purposes of the hearing on the request for temporary injunction. (Ex. 1, pp. 3-5; Ex. 2; Ex. 2-A). Rather than attack the theory upon which these estimates were made, International has chosen to castigate the parties who made them. The estimates therefore stand unrebutted.

IV

The Court Should Permit Petitioner to Submit Additional Exhibits Not a Matter of Record in the Courts Below for the Limited Purpose of Persuading the Court That the Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court.

The respondents would have the court limit the exhibits to be considered with respect to a petition for writ of certiorari to the record on which the case was submitted

to the District Court, and cite as authority for this statement Rule 12, U.S. Sup. Ct. Rules. (Resp. Br. p. 8). Rule 12 pertains to certification of the record below. It does not limit the exhibits that may be considered.

One of the criteria for determining if a writ of certiorari should be issued is whether the Court of Appeals below "has decided an important question of federal law which has not been, but should be, settled by this court; * * * ." Par. 1(b), Rule 19, U.S. Sup. Ct. Rules. The importance of the question presented is not an issue in the courts below, only the merits. In fact, petitioners were precluded by the District Court from even discussing or arguing the importance of the issues to franchisees, in general, all over the country. (Tr. 58, 59).

International's sole objection to Exhibits 16 through 29, inclusive is that none "were before either the District Court or the Court of Appeals." (Resp. p. 8). This is not entirely true. Exhibit 26 was part of the record before both the District Court and the Eighth Circuit. As to the other named exhibits, we contend they are appropriate for consideration for the reasons that follow.

Some of the exhibits contain evidence of matters and transactions that occurred subsequent to the hearing on the request for preliminary injunction. These include the various financial statements for periods ending September 30, 1969, 1970 and 1971 (Exs. 18-20), International's complaint in the unlawful detainer action against Helfenbein (Ex. 21), the Beckstead complaint (Ex. 27), and the rent check to International (Ex. 28). There are circumstances where it is appropriate to set out relevant matters that occurred subsequent to the compilation of the record in the courts below. For example, reference is made to *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 48, where certain exhibits concerning events that occurred subsequent to considera-

tion of that case by the Court of Appeals were considered by this Court for the purpose of determining whether the controversy was moot. It is realized that this does not justify consideration of the financial statements for the periods ended September 30, 1967 and 1968. As to all of the financial statements, it is important to consider them to show the effect of the removal of tying restrictions on franchisees, in general. Such information with respect to franchisees in general simply was not available when petitioners' brief was written, and it was considered appropriate under the circumstances to recite this information as to Helfenbein only. And as to all of the additional exhibits, they should be considered for the sole purpose of determining the importance of the "question of federal law which has not been, but should be, settled by this court." Par. 1(b), Rule 19, U.S. Sup. Ct. Rules.

We respectfully request the Court to take judicial notice of the complaints filed in International's unlawful detainer action against Helfenbein (Ex. 21), and in the Beckstead case. (Ex. 27). This Court has apparently not previously ruled upon whether it will take judicial notice of the pleadings of record in a completely separate action. However, such pleadings are a matter of public record. They are therefore offered as proper subjects for judicial notice. c.f. *Zahn* v. *Transamerica Corp.*, 162 F.2d 36, 48 (3rd Cir.), note 20.

Further, we respectfully request the Court to take judicial notice of the various copies of bills proposed to Congress which were attached as Exhibits 22 through 25, inclusive. In earlier cases this Court has taken judicial notice of the history of legislation. *Alaska* v. *American Can Co.*, 358 U.S. 224, 226, 227; *U.S.* v. *American Trucking Association*, 310 U.S. 534, 547. Although the various proposed bills contained on the exhibits offered by Helfenbein

have not as yet been enacted into legislation, we submit it is just as logical to give judicial notice to the history of legislation that has not as yet been enacted as it is to give judicial notice to the history of enacted legislation.

Exhibit 29 is an article which is, in effect, a summary of the various state laws and regulations affecting franchising that have been enacted or that have recently been proposed or put under study. Again, it is submitted and contended to be appropriate for the sole purpose of showing this Court the importance of deciding the issues presented by Helfenbein's petition.

V

International Has Made Unfair and Misleading Comments to the Court Regarding the Beckstead Case, Infra, in That International Has Attempted to Lead the Court to Believe Such Case Was Dismissed for Lack of General Merit When in Fact the Dismissal Was Based Solely Upon the Purported Inappropriateness of the Case as a Class Action. The Beckstead Complaint Should Still Be Considered by the Court As Evidence of the Need for a Judicial Curtailment of the Wrongful Termination of Franchises Within the Fast Food Franchise Industry.

Petitioners complain about the fairness of the comments respondents make in their brief (at p. 8) concerning the *Beckstead* case (*Beckstead* v. *International Industries, Inc.*, No. 993376, Superior Court of the State of California in and for the County of Los Angeles) previously referred to by petitioners. (Pet. Br. p. 15). In attempting to completely deflate the importance and pertinence of the *Beckstead* case, and to wrongfully belittle counsel for petitioners in the eyes of the Court, respondents stated with respect to that case:

> "* * * We are filing with this Court a copy of the Clerk's Docket Sheet, attested to by him which shows that, on May 28, 1971, the complaint in *Beckstead* was

> dismissed on demurrer. We make this comment in view of the extensive discussion of *Beckstead* by Petitioners (Pet. pp. 15-17), and petitioners' failure to advise this Court of the dismissal of the *Beckstead* complaint."

The Clerk's Docket Sheet filed by respondents shows on its face that the *Beckstead* case was dismissed only because of the class action nature of its contents, and that plaintiffs were given leave to refile on the merits of their individual complaints.[8] Of what pertinence, therefore, is the dismissal to petitioners' original comments regarding that case? And even if such dismissal was pertinent, it occurred on May 28, 1971, about four days before the actual filing of Petitioners' brief, and petitioners' counsel were unaware of such dismissal until receipt of respondents' brief.

The Beckstead complaint therefore remains as evidence of the need for a judicial curtailment of the wrongful termination of franchises by franchisors within the fast food franchise industry.

CONCLUSION

Franchising is a significant segment of the American economy. Many franchisees are required by their franchisor to purchase substantial portions of their supplies from their franchisor, or from a purveyor approved by their franchisor. Such franchisees have significantly lower incomes than others who are not burdened with similar restrictions. Further, many franchisees have lost

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8. The entry on the Clark's Docket Sheet in the *Beckstead* case referred to at page 8 of respondents' brief and filed by respondents as an exhibit states, in pertinent part:

> Demurrers and each of them are sustained, on grounds stated therein, without leave to amend as to the rights in the Class Action, with leave to amend as to right to file on behalf of individually named Plaintiffs. Plaintiff has 60 days to amend.

considerable amounts of money invested in their franchises, oftentimes their life savings, and a substantial reason for such losses are the tying agreements imposed by franchisors. There is a great imbalance of power between franchisors and franchisees. One-sided license agreements permitting franchisors to terminate franchisees and evict them from their franchised businesses are used to keep franchisees in line, to discourage litigation challenging the tying requirements imposed by the franchisor, and to harass with multiple and vexatious litigation those franchisees who do challenge the system or who are no longer willing or able to abide by it. Numerous small businessmen are thereby removed from business, and the entire American economy is adversely affected to a substantial degree. These are the conclusions one can draw from the evidence discussed in petitioners' supplemental brief.

In the case on review, Helfenbein, after finding the tying requirements too burdensome a system to honor, and after suffering losses that caused him to become delinquent in meeting his financial obligations to International, renounced such tying requirements, and subsequently challenged such requirements by means of this litigation. International's response to his actions has been an attempt to remove him from his restaurant by means of unlawful detainer action in the courts of the State of Missouri. Such litigation could be avoided only by paying the entire indebtedness claimed due by International, including certain severable service charges for illegally tied services that were renounced and have not in fact been performed by International. The defense of such litigation by Helfenbein would require proof substantially identical to the proof of his antitrust suit against International. To undertake the defense of this litigation in a separate court

action would unduly burden Helfenbein and severely impair his ability to prosecute the antitrust action. Such separate action should therefore be enjoined; however, International should be permitted, if it so desires, to file a counterclaim in the antitrust action seeking possession of Helfenbein's restaurant premises. Helfenbein does not desire to use the Federal antitrust laws to obtain something for nothing, only to avoid multiple and vexatious litigation.

The Courts below have refused the requested relief, basing their refusal primarily on this Court's decisions in *Kelly* v. *Kosuga,* 358 U.S. 516 (1959) and *Bruce's Juices* v. *American Can Co.,* 330 U.S. 743 (1947). The injunction, however, does not offend such decisions. Further, such decisions are inapplicable to the severable charges for the renounced illegally tied services that were not performed. And lastly, the failure to grant the injunction will help perpetuate the continuance of the illegal tying arrangement. For the foregoing reasons, this Court's decisions in the two cited cases should be clarified.

This is not, and should not be treated by the courts as a simple unlawful detainer action by a landlord for failure of a tenant to pay rent. The courts should recognize that much more complicated factors are involved in the attempted removal of a franchisee by his franchisor/landlord. The franchisor should not be permitted to recover the premises if the financial delinquencies of the franchisee arose out of the burden of illegal tying restrictions, or if the claimed breach of the license agreement arises out of a renunciation of the illegal tying requirements and subsequent failure to pay severable charges for illegally tied services that were not furnished. And lastly, the much more powerful franchisor should not be permitted to use its leverage to involve the franchisee in multiple litigation over such issues.

The issues surrounding the attempted termination of Helfenbein's franchise are important to the entire franchising community, and deserve the attention of this Court.

Respectfully submitted,

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APPENDIX D

The following bill was introduced on August 6, 1971 as S. 2472, 92nd Congress, 1st Session, by the Honorable Philip A. Hart, United States Senator from the State of Michigan (the text of the bill is copied from 117 Cong. Rec. S 13501 [Daily ed. Aug. 6, 1971]):

S. 2472

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fairness in Franchising Act"

Sec. 2. As used in this Act—

(a) The term "person" means a sole proprietor, partnership, corporation, or any other form of business organization.

(b) The term "franchise" shall mean a contract or agreement, either expressed or implied, whether oral or written, between two or more persons, excluding credit or financing arrangements, relationships between manufacturers, agreements of a bona fide and express interm or trial nature requiring a relatively small new investment by the franchisee (as hereinafter described), and warranty, cooperative advertising, training, and other programs provided by one person to another person which other person receives his franchise from a third party—

(1) wherein a commercial relationship of definite duration or continuing indefinite duration is involved;

(2) wherein one person, hereinafter called the "franchisee", is granted the right to offer, sell, and distribute goods or services to the extent that they are manufactured, processed, distributed, or (in the case

of services) organized and directed by the other person, hereinafter called the "franchisor";

(3) wherein the franchisee as an independent business constitutes a component of franchisor's distribution system;

(4) wherein the operation of franchisee's business franchise is substantially associated with a franchisor's trademark, service mark, trade name, advertising or other commercial symbol designating the franchisor; and

(5) wherein the operation of franchisee's business is substantially reliant on franchisor for the continued supply of goods or services.

(c) The term "goods" means any article or thing without limitation, or any part of such article or thing, including any article or thing used or consumed by a franchisee in rendering a service established, organized, directed, or approved by a franchisor.

(d) The term "commerce", as used herein, means trade or commerce among the several States or from foreign nations and any State or territory of the United States or the District of Columbia, or between the District of Columbia or any territory of the United States and any State or territory, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or territory of the United States or any insular possession or other place under the jurisdiction of the United States.

Sec. 3. It shall be a violation of this Act for any franchiser engaged in commerce, directly or through any officer, agent, or employee to terminate, cancel, or fail to renew a franchise for any reason whatsoever without having first given written notice of such termination, cancellation, or intent not to renew to the franchisee at least ninety days in advance of such termination, cancelation, or failure to renew.

Sec. 4. Notwithstanding the terms, provisions, or conditions of any franchise, and except as provided in section 5, it shall be a violation of this Act, unless done for good cause and for legitimate business reasons, for any franchiser engaged in commerce, directly or through any officer, agent, or employee to terminate, cancel, or fail to renew a franchise or threaten to terminate, cancel, or fail to renew a franchise. Any franchiser, engaged in commerce, who does terminate, cancel, fail to renew or who threatens to terminate, cancel, or fail to renew a franchise shall have the burden of proving that the termination, cancelation, failure to renew or threat of termination, cancellation, or failure to renew a franchise was done for good cause and for legitimate business reasons. For the purposes of this Act, good cause shall include:

(a) Failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise which requirements are both essential and reasonable; or,

(b) Use of bad faith by the franchisee in carrying out the terms of the franchise.

For the purposes of this Act, legitimate business reasons shall include those Acts defined as good cause but shall not include:

(a) Any conduct which violates the antitrust laws, including section 5 of the Federal Trade Commission Act; or,

(b) Cancellation, termination, or failure to renew for the purpose of enabling the franchisor to take over the franchisee's business, unless reasonable compensation is paid for the value of the franchisee's business including goodwill.

Sec. 5. The provisions of section 4 of this Act shall not apply to any written franchise containing provisions for the binding arbitration of disputes concerning the items covered in section 4 in accordance

with the rules of the American Arbitration Association or other similar rules: *Provided,* That the criteria for determining whether good cause and legitimate business reasons existed for the termination, cancellation, or refusal to renew the written franchise shall be no less than that outlined in section 4 of this Act: *And provided further,* That the allowable compensation to a franchisee terminated for other than good cause shall be no less than that provided in section 7.

Sec. 6. It shall be a violation of this Act for any franchisor engaged in commerce, directly or through any officer, agent, or employee to engage directly or indirectly in methods of competition with any franchisee that constitute unfair methods of competition within the meaning of the Federal Trade Commission Act.

Sec. 7. Any franchise may bring an action against a franchisor for violation of this Act in any district court of the United States in the district in which the franchisor resides or is found, or has an agent, or in which the cause of action arises, without respect to the amount in controversy, and shall recover the damages by him sustained by reason of the franchisor's failure to comply with this Act, together with the costs of the action, including reasonable attorney fees.

Sec. 8. Any action brought pursuant to this Act shall be forever barred unless commenced within two years after the cause of action shall have accrued.

Sec. 9. No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States. This Act is and shall be deemed supplementary to, but not a part of, the antitrust laws of the United States.

Sec. 10. This Act shall become effective six months after the date of its enactment.

Sec. 11. This Act shall not invalidate any provision of the laws of any State except insofar as there is

a direct conflict between an express provision of this Act and an express provision of State law which cannot be reconciled.

Sec. 12. If any provision of this Act or the application of such provision to any person or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall be affected thereby.